Applicant Details

First Name	**Christopher**
Middle Initial	**W**
Last Name	**Rice**
Citizenship Status	**U. S. Citizen**
Email Address	**cwrice@law.gwu.edu**
Address	**Address** Street **18320 1st Street** City **Lawrence** State/Territory **Kansas** Zip **66044** Country **United States**
Contact Phone Number	**785 331-8381**

Applicant Education

BA/BS From	**University of Kansas**
Date of BA/BS	**May 2018**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 19, 2024**
Class Rank	**I am not ranked**
Does the law school have a Law Review/Journal?	**No**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Van Vleck Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **No**
Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Nauvel, Christian
Christian.Nauvel@usdoj.gov
202-514-0350
Gavoor, Aram
agavoor@law.gwu.edu
917-562-9230

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Christopher W. Rice
18320 1st Street
Lawrence, Kansas 66044

6/8/2023

Honorable Stefan R. Underhill
United States Courthouse
915 Lafayette Boulevard
Suite 411
Bridgeport, Connecticut 06604

Dear Judge Underhill:

I am a law student at The George Washington University Law School and will be graduating in May 2024. I am writing to apply for a judicial clerkship with you for the 2024-26 terms. I am enclosing my resume, my transcript, and a writing sample. Also included are recommendations from Professor Aram Gavoor and Mr. Christian Nauvel, who was my supervisor at the Department of Justice. Thank you for your consideration.

Respectfully,

Christopher Rice

Christopher "Kit" Rice

18320 1st Street, Lawrence, Kansas 66044 - (785) 331-8381 - cwrice@law.gwu.edu

EDUCATION

The George Washington University Law School **Washington, D.C.**
J.D. expected May 2024
GPA: 3.37
Activities: Moot Court Board, Chair of First-Year Competitions; Dean's Fellow; Research Assistant to Professor Kathryne Young; Inns of Court Student Advisor

St. John's College **Santa Fe, NM**
M.A., Eastern Classics – Sanskrit Language Concentration August 2020
Thesis: *Novel Conceptions of Nirvana in the Saddharma Puṇḍarīka Sūtra*
Activities: Graduate Student Council, Constitutional Steward (drafted governing documents); President, Film Analysis Club (founder of classic film discussion group)

The University of Kansas **Lawrence, KS**
B.A.in English Literature May 2018
Honors: Honors Program Graduate; Dean's List Scholar; Freeman Foundation Scholarship for East Asia Internships, Gwangju, South Korea; Summer Art and Culture Scholar, Florence, Italy
Journal: Literature and Politics Editor, *Undergraduate Research Journal for the Humanities*

EXPERIENCE

U.S. Attorney's Office, District of New Jersey **Camden, NJ**
Summer Law Intern May 2023 – July 2023

U.S. Department of Justice **Washington, D.C.**
Summer Law Intern – Money Laundering Asset Recovery Section May 2022 – November 2022
Research: Researched cutting edge legal issues in forfeiture, bank integrity, money laundering, and sanctions violations
Writing: Drafted motions and international correspondence, authored research memos, and co-authored a weekly newsletter on developments in cryptocurrency and digital assets
Advocacy: Strengthened advocacy skills by participating in meetings with defense counsel, assisting trial attorneys in litigation preparation, and taking part in Department training programs

Meem Library at St. John's College **Santa Fe, NM**
Archival Research Assistant August 2019 – May 2020
Research: Collaborating with Archival librarians in identification and care of rare books
Organization: Reorganizing and cataloguing Library's collection of over 20,000 historical artifacts

First Leap English School **Beijing, P.R. China**
English Teacher June 2018 – March 2019

SKILLS AND INTERESTS

- Proficient reader of Classical Latin, Vedic Sanskrit, and Classical Sanskrit
- Conversational Italian and German
- Classically trained Pianist and Operatic Tenor

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G24253279
Date of Birth: 07-FEB

Date Issued: 23-JAN-2023

Record of: Christopher W Rice

Page: 1

Student Level: Law
Admit Term: Fall 2021

Issued To: CHRISTOPHER RICE
CWRICE@GWU.EDU

REFNUM:95021735

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
Law School			
Law			
LAW 6202	Contracts Schooner	4.00	B+
LAW 6206	Torts Turley	4.00	B-
LAW 6212	Civil Procedure Morrison	4.00	B
LAW 6216	Fundamentals Of Lawyering I Juni	3.00	B
Fhrs	15.00 GPA-Hrs 15.00 GPA 3.000		
CUM	15.00 GPA-Hrs 15.00 GPA 3.000		
Spring 2022			
Law School			
Law			
LAW 6208	Property Schwartz	4.00	B+
LAW 6209	Legislation And Regulation	3.00	B+
LAW 6210	Criminal Law Solove	3.00	A-
LAW 6214	Constitutional Law I Colby	3.00	A
LAW 6217	Fundamentals Of Lawyering II Juni	3.00	A
Fhrs	16.00 GPA-Hrs 16.00 GPA 3.646		
CUM	31.00 GPA-Hrs 31.00 GPA 3.333		
Good Standing			
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT			
Fall 2022			
Law School			
Law			
LAW 6230	Evidence	3.00	A
LAW 6380	Constitutional Law II	3.00	A-
LAW 6400	Administrative Law	3.00	A-
LAW 6683	College Of Trial Advocacy	3.00	B+
Fhrs	12.00 GPA-Hrs 12.00 GPA 3.667		
CUM	43.00 GPA-Hrs 43.00 GPA 3.426		
Good Standing			
Fall 2022			
Law School			
Law			
LAW 6644	Moot Court - Van Vleck	1.00	----------
	Credits In Progress:	1.00	

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Spring 2023			
LAW 6362	Adjudicatory Criminal Pro.	3.00	----------
LAW 6363	Role Of The Federal Prosecutor	2.00	----------
LAW 6378	Selected Topics In Crim. Law	3.00	----------
LAW 6379	Criminal Law/Procedure Seminar	2.00	----------
LAW 6521	International Money Laundering	3.00	----------
	Credits In Progress:	13.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	43.00	43.00	147.33	3.426
OVERALL	43.00	43.00	147.33	3.426

################## END OF DOCUMENT ##################

Ed Edmondson
University Registrar

This transcript processed and delivered by Parchment

U.S. Department of Justice

Criminal Division

Office of Assistant Attorney General *Washington, D.C. 20530*

April 11, 2023

VIA EMAIL

Teresa Kona
Clerkships Coordinator
The George Washington University Law School
Center for Professional Development and Career Strategy
716 20th Street NW, Suite B310
Washington, DC 20052
teresakona@law.gwu.edu

Re: Recommendation for Christopher "Kit" Rice

Dear Ms. Kona:

By way of this letter, I would like to provide my highest recommendation for Christopher "Kit" Rice, who served as an intern in the Money Laundering and Asset Recovery Section ("MLARS") of the U.S. Department of Justice's ("DOJ's") Criminal Division during the summer and fall of 2022. By way of background, MLARS leads the DOJ's asset forfeiture and anti-money laundering enforcement efforts. Among other responsibilities, MLARS prosecutes and coordinates complex, sensitive, multi-district, and international money laundering, fraud, and asset forfeiture investigations and cases. MLARS also manages the DOJ's Asset Forfeiture Program, including by distributing forfeited funds and properties to appropriate domestic and foreign law enforcement agencies and crime victims.

During this timeframe, in addition to being a Trial Attorney in MLARS's Bank Integrity Unit ("BIU"), I served as one of MLARS's internship coordinators. As such, I assigned projects to our summer interns, received feedback from the attorneys they worked for, and personally supervised the interns when they were assigned projects from my own active investigations and cases. I had the pleasure of working closely with Kit, and given the chance, I would absolutely work with him again. At the conclusion of his time at DOJ, I encouraged him to apply for the DOJ's Honors program and (in the meantime) believe that he would also make a fine law clerk.

During his time at MLARS, Kit assisted with several active criminal investigations and cases—principally by conducting factual and legal research. Kit produced work product that was timely, thorough, and showcased his strong writing and analytical skills. Kit was always open to feedback and worked hard to ensure the final product was his best. Over the course of his internship, Kit was extremely productive, often proactively sought out new projects, and was always one of the first to volunteer for a new project. Kit was also very responsive—which was

very important, given the fast pace of MLARS's investigations and cases. Finally, Kit was very friendly, motivated, and overall, a great person to work with. The criminal prosecutors in our office appreciated his consistently positive outlook and enthusiasm for every project he was assigned.

Should I be able to provide any additional information that would be helpful in Kit's applications, please do not hesitate to reach out.

Sincerely,

Christian J. Nauvel
Senior Counsel
Office of the Assistant Attorney General
Criminal Division, U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
202-514-0350 (o) | 202-230-0675 (c)
christian.nauvel@usdoj.gov

June 09, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

I enthusiastically recommend Christopher “Kit” Rice for a clerkship in your chambers. His intellect, passion for the law, work ethic, and poise make him an excellent candidate. If given the opportunity to clerk in your chambers, I am confident that he will succeed in his work with minimal need for supervision.

Kit took my Administrative Law course in fall 2022 at the George Washington University Law School. He earned an A- by performing well on my examination and by capably answering my Socratic method questions. He is enrolled in my spring 2023 Constitutional Law II (individual liberties) course. In my several conversations with Kit, I was impressed with his comprehension of constitutional and statutory interpretive methodologies. This comes as no surprise because of his extensive knowledge of multiple languages, including Classical Latin, Vedic, and Sanskrit. Outside the classroom, Kit is fully invested in law school by virtue of his active role with the Moot Court Board, Research Assistant role with Professor Kathryne Young, and his membership in the Criminal Law Society and International Law Society. If given the opportunity to clerk for you, Kit would draw upon his U.S. Department of Justice internship experience to rigorously apply the law to the facts and facts to the law in your chambers.

Kit also has the temperament to capably serve as a clerk. He is humble, yet assertive. He is deeply thoughtful and methodical in his approach to the law. Most importantly, he is mature, exercises sound judgment, and has a pleasant demeanor. If you have any questions about or would like to discuss my unreserved recommendation of Kit, please do not hesitate to contact me at (202) 994-2505 or at agavoor@law.gwu.edu.

Sincerely,

Aram A. Gavoor
Associate Dean for Academic Affairs
& Professorial Lecturer in Law

In order to conserve space the cover page and summary of facts have been excised.

SUMMARY OF THE ARGUMENT

The government seeks to use as evidence a firearm purportedly found in plain view in Ms. Michaels' apartment during an unwarranted and unwanted search nominally undertaken to secure clothing. This effort should be rejected, and the district court's decision granting Ms. Michaels's motion to suppress upheld.

First, neither the 'standalone' clothing exception nor the 'exigency' clothing exception are valid as a matter of law. The standalone clothing exception is contradicted by both Supreme Court and Eleventh Circuit precedent while the exigency clothing exception is an improper expansion of currently accepted exigent circumstance exceptions to the Fourth Amendment. This Court has previously determined that the standalone clothing exception is nothing more than an improper 'community caretaking' search of a home, while the Supreme Court has echoed this Court in ruling that 'community caretaking' searches of homes are unconstitutionally unreasonable. The exigency clothing exception is likewise inconsistent with this Court's views that a high standard must be applied to determinations of exigency, or risk eviscerating the Fourth Amendment.

Second, even if the clothing exception were valid as a matter of law, it would not be applicable in Ms. Michaels's case. In determining whether the exception applies in a given case, the circuits that have adopted the clothing exceptions have primarily focused on whether or not exigent circumstances are present and if there is reason to believe that the search is pretextual or in service of an interest other than protecting an arrestee's health. In Ms. Michaels's case there were no exigent circumstances to justify the search and there is a paucity of evidence pointing to a serious concern for Ms. Michaels's health on the part of the officers.

ARGUMENT

The proposed clothing exception is not valid as a matter of law because it is inconsistent with binding precedent, with the well-reasoned decisions of other circuits, and is only supported by overbroad rulings in the few circuits that have adopted it. Even if the proposed clothing exception were valid as a matter of law, its application to Ms. Michaels would be improper since the factors typically employed in clothing exception cases do not support its application in this case.

I. THE CLOTHING EXCEPTION SHOULD BE REJECTED AS A MATTER OF LAW BECAUSE IT IS INCONSISTENT WITH BINDING PRECEDENT, IT IS INCONSISTENT WITH PRECEDENT FROM A NUMBER OF OTHER CIRCUITS, AND PRECEDENT SUPPORTING THE EXCEPTION IS UNSOUND.

The district court correctly repudiated the clothing exception a matter of law because it is contraindicated by precedent set by the Supreme Court and this Court, has been thoroughly rejected in well-reasoned holdings by the circuits that have declined the opportunity to adopt it is only supported by rulings of the circuits that have adopted it unconvincingly.

Both this Court and the Supreme Court have rejected any expansion of exceptions to warrant requirements under the Fourth Amendment, including the expansion of exigent circumstance doctrine. *See Caniglia v. Strom*, 593 U.S. ___, 141 S. Ct. 1596, 1600 (2021) (rejecting the application of 'community caretaking' searches to homes, stating that "[the Supreme] Court has repeatedly declined to expand the scope of… exceptions to the warrant requirement to permit warrantless entry into the home"); *Lange v. California*, 593 U.S. ___, 141 S. Ct. 2011, 2024 (2021) (overruling prior jurisprudence by narrowing the scope of exigent

circumstances to no longer include the flight of a misdemeanant); *United States v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002) (setting a high standard for warrantless searches of homes justified by exigent circumstance, which may only lawfully be carried out as "an immediate response to protect citizens from imminent danger" in the defense of "the sanctity of human life"). The resistance of both this Court and the Supreme Court to expand exceptions to the Fourth Amendment indicates that a decision to implement a clothing exception as an expansion of existing exigent circumstances doctrine would not only be inconsistent with the binding precedent already established by this Court but would also run a near-certain risk of being overturned by the Supreme Court as overly invasive.

Furthermore, the notion that a clothing exception search can be carried out in the absence of exigent circumstances has been wisely rejected by this Court as nothing more than a 'community caretaking' search, which the Supreme Court has expressly rejected when applied to homes. *See Caniglia* at 1599 (holding that warrantless search of an arrestee's home predicated solely on officers' 'community caretaking' duties was unconstitutional because warrantless searches of homes not based on exigency are presumptively unreasonable); *United States v. McGough*, 412 F.3d 1232, 1239 (11th Cir. 2005) (holding that a warrantless search of a home to secure shoes for an arrestee's minor child was unlawful because, in the absence of exigent circumstances, a warrantless search predicated solely on a supposed duty to secure clothing is nothing more than an improper 'community caretaking' search). This Court's identification of clothing searches based on a 'duty to clothe' as 'community caretaking' searches in conjunction with the Supreme Court's specific ruling that such searches are unconstitutional indicates that this Court should explicitly reject the 'duty to clothe' clothing exception. *See Caniglia*, 141 S. Ct. at 1599; *McGough*, 412 F.3d at 1239.

A number of other courts have expressly and convincingly rejected any clothing exception, holding that consent is necessary for warrantless searches carried out specifically to find clothing or footwear for arrestees. *See United States v. Whitten*, 706 F.2d 1000, 1016 (9th Cir. 1983) (holding in part that a warrantless search of arrestee's room with the purpose of clothing an underwear-clad arrestee was unlawful because the arrestee had neither consented nor made a specific request that he wish to be further clothed); *United States v. Kinney*, 638 F.2d 941, 944 (6th Cir. 1981) (holding that "entry cannot be justified" in the case of a warrantless search to find clothing for an arrestee who has neither consented to nor requested the search for further clothing regardless of the certain embarrassment of being exposed to the public while in a state of undress); *United States v. Anthon*, 648 F.2d 669, 676 (10th Cir. 1981) (holding that an unwarranted and unwanted search intended to secure clothing for an arrestee dressed solely in a swim suit was "violative of his rights secured by the Fourth Amendment" since no exigency required the search); *U.S. v. Jackson*, 414 F.Supp.2d 495, 507 (D.N.J. 2006) (ruling that consent justified a search for clothing and obviated any possible need for the application of the clothing exception).

These decisions from other courts draw a clear and tenable line: outside of extraordinary circumstances, consent is an absolute necessity in carrying out warrantless searches. As the Tenth Circuit held in *Anthon*, anything less than that would constitute a violation of constitutional protections. In *Whitten* and *Kinney* the Ninth Circuit and the Sixth Circuit both expressly held that an officer may only launch an unwarranted search for clothing when they have been given specific consent to carry out that search or an arrestee has specifically requested that officers secure additional clothing. *Whitten*, 706 F.2d at 1016; *Kinney*, 638 F.2d at 944. The Tenth Circuit also held in *Anthon* that consent was required for searches to secure clothing and

qualified that requirement by allowing for exigent circumstances to excuse unwarranted searches. *Anthon*, 648 F.2d at 676. These circuits held the arrestee's ability to safeguard their own health, safety, and dignity in very high regard. Furthermore, the circuits that have required consent for unwarranted and non-exigent clothing are closer to the view this Court expressed in *Holloway*; that Fourth Amendment protections of the "sanctity" of the home are key and should only be suspended when doing so is absolutely necessary to protect the sanctity of human life. *Holloway*, 290 F.3d at 1337. The standard set in *Holloway* would allow for adopting a consent requirement for non-exigent searches for clothing in conjunction with the extent high standard for exigency.

On the other hand, the rulings in support of the clothing exception from the adopting circuits are not compelling because they are based on unsound reasoning and are inconsistent with the high standards for exigency this Court established in *Holloway*. *See Holloway*, 290 F.3d at 1337 (ruling that exigent circumstances only justify warrantless searches and seizures when they are performed as "an immediate response to protect citizens from imminent danger" "where officers reasonably believe a person is in danger," in order to protect the "sanctity of human life"); *contra, e.g., United States v. Wilson*, 306 F.3d 231, 240–41 (5th Cir.2002) (rev'd on other grounds) (holding that an arrestee being required to walk on a sidewalk was sufficiently exigent to justify a warrantless search for shoes because the mere "potential of a personal safety hazard to the arrestee places a duty on law enforcement officers to obtain appropriate clothing"); *United States v. Butler*, 980 F.2d 619, 622 (10th Cir. 1992) (declaring that a warrantless search of a home "cannot be effected… solely upon the desire… to complete the arrestee's wardrobe" but must also contemplate the probable risk presented to arrestee); *United States v. Gwinn*, 219 F.3d 326, 333–34 (4th Cir. 2000) (implementing a lax five-factor test for reasonability of clothing

exception searches that fails to focus on the issues of immediacy of response, or imminence of danger).

The standards set in *Holloway* were wisely and intentionally set high. In *Wilson*, for instance, the Fifth Circuit's holding that a clothing exception search is justified by the mere possibility that an arrestee could be harmed is wholly incompatible with the *Holloway* standard's requirement that exigency only justifies searches in which an officer reasonably perceives imminent risk of bodily harm. *Wilson*, 306 F.3d at 240-41; *Holloway*, 290 F.3d at 1337. There are a limitless number of situations in which *Wilson* justifies a search that would be unlawful under *Holloway*. For instance, there is a risk that any arrestee wearing high-heeled shoes could trip and fall, potentially being injuring. Under *Wilson*, officers would be justified in launching an unwarranted and unwanted search of fully dressed arrestees based on the mere possibility that such shoes increase the risk of tripping. This is incompatible with the standard this Court set in *Holloway*.

The Tenth Circuit's reasoning in *Butler* likewise did not reach the standard set by this Court in *Holloway*. In *Butler* the Tenth Circuit reasoned that clothing exception searches are only permissible when there is "legitimate and significant threat to the health and safety" of an arrestee. *Butler*, 980 F.2d at 621-22. The key differentiation between the *Butler* standard and this Court's precedent on exigency is that the *Butler* standard does not require imminency while the *Holloway* standard does. *Id*.; *Holloway*, 290 F.3d at 1337. In *Holloway* this court correctly pointed out that the purpose of exigent circumstances exceptions to warrant requirements is to recognize the reasonability of searches in situations where a compelling and imminent danger precludes the possibility that officers could seek less invasive methods or obtain a warrant first. *Id*. By failing to include an imminent danger requirement, the standard set forth in *Butler* is also

rendered untenable, since it could permit searches in situations where officers could have sought a warrant in order to avoid a non-imminent but "legitimate" and "significant" threat but instead arbitrarily chose not to do so. The standards set by the Fourth Circuit in *Gwinn* similarly do not limit clothing exception searches to situations in which an imminent threat creates exigency. *Gwinn*, 219 F.3d at 333-34. Inasmuch as *Butler* and *Gwinn* effectively allow for warrantless searches of homes for clothing in the absence of actual exigent circumstances, they arguably amount to little more than dressed-up community caretaking searches, something this Court has already expressly rejected.

The clothing exception is inconsistent with binding precedent as well as the carefully reasoned persuasive precedent other circuits that have declined to adopt it. Meanwhile, what meager support the exception enjoys in other circuits is unsound. This Court should not join the circuits that have eviscerated the Fourth Amendment in such a careless and unsupported way, which would be likely to provoke a just reversal by the Supreme Court.

II. EVEN IF THE PROPOSED CLOTHING EXCEPTION WERE ADOPTED, THE FACTS SURROUNDING MS. MICHAELS'S ARREST DO NOT JUSTIFY ITS APPLICATION.

Even assuming that the proposed clothing exception were valid, the facts of Ms. Michaels's case would not support its application. Cases in which an arrestee have comfortably and safely clothed themselves, as Ms. Michaels had, do not allow law enforcement officers to apply the proposed exception to ignore arrestees' Fourth Amendment rights.

In the narrow instances where courts have found a clothing exception search valid, they have primarily focused on two factors. First and foremost, the officer conducting the search must

be presented with an "objective need" to protect an arrestee from a "substantial risk of injury" to health, safety, or dignity due to their state of undress. *See Gwinn*, 219 F.3d at 333-34; *United States v. Titus*, 445 F.2d 577, 578-79 (2d Cir. 1971) (holding in part that officers were justified in conducting a warrantless search for clothing because the completely naked arrestee would have been exposed to unavoidable risk of harm to health by cold weather and damage to dignity by being arrested in the nude); *United States v. Butler*, 980 F.2d 619, 621 (10th Cir. 1992) (holding that a warrantless search of an arrestee's home was justified because the arrestee was barefoot and surrounded by broken glass that presented a nearly absolute risk to his health); *United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977) (holding that the likely dignitary harm suffered by arrestee who was wearing clothing specifically intended to be worn in private justified a warrantless entry into her home where plain-view evidence was seized).

Second, the search for clothing must clearly and solely serve the purpose of protecting arrestee's health and must not be merely pretextual. *See Gwinn*, 219 F.3d at 332 (finding that officer's search was not pretextual because it was, on advice of arrestee's spouse, strictly limited to an area where officer would be able to find shoes and clothing); *Butler*, 980 F.2d at 620 (finding that officer's search was not pretextual because it was strictly limited to the room in which the arrestee advised officer where shoes could be found); *contra, e.g., United States v. Bonitz*, 826 F.2d 954, 957-58 (10th Cir. 1987) (finding that a warrantless search for a bomb 'smacked' of pretext because officers did not carry out the search in a manner consistent with the stated goal to secure the safety of those in the purported effective area of the bomb, clearly indicating a reason for the search other than the protection of health and safety).

Officer Roddar was not presented with an objective need to protect Ms. Michaels's health, safety, or dignity from a substantial risk of injury. In *Titus*, in which a naked arrestee was

arrested on one of the coldest nights of the year in upstate New York, there was clear risk of injury to an arrestee's health. *See Titus*, 445 F.2d at 578. The temperature, which was significantly below freezing, presented an imminent and serious risk to the arrestee's health and created a clear exigency. *Id.* Here, the temperature was well above freezing at over 50 degrees Fahrenheit and could not have reasonably qualified as an imminent danger. J.A. at 4. Furthermore, a clothing exception search is valid only if officers are presented with an "objective need" to provide additional clothing. *Gwinn*, 219 F.3d at 333-34. Since Ms. Michaels had already chosen to go and remain outside in the light clothing she was wearing at the time officers encountered her, the claim that officer's were presented with an "objective need" to provide her with additional clothing is untenable. J.A. at 4. After all, Ms. Michaels is a reasonable adult able to make decisions about what clothing is appropriate for her to wear in any climate and was not ambushed and taken into custody in a clearly unsafe state of dress such as the arrestee in Titus. J.A. at 4; *Titus*, 445 F.2d at 578.

In this case, the possible risk of harm to Ms. Michaels's safety due to her lack of footwear bears a superficial similarity to the arrestee in *Butler*. J.A. at 4; *Butler*, 980 F.2d at 621. However, on closer evaluation, the facts of this case do not support that comparison and actually clearly distinguish this case from *Butler*. The broken glass and sharp, shards of metal that posed a clear and unavoidable danger to arrestee's safety in *Butler* are not present in this case. J.A. 4-8; *Butler*, 980 F.2d at 621. In this case there is no evidence to support the assertion that any debris whatsoever stood between Michaels and officers' squad car, while in *Butler* the path from arrestee's home to officers' squad car was completely covered in dangerous debris. J.A. 4-8; *Butler*, 980 F.2d at 621. Furthermore, the arrestee in *Butler* was completely barefoot while Ms. Michaels was wearing hospital-style, thick-soled, protective socks. *Butler*, 980 F.2d at 621; J.A.

at 4-8. While the record does indicate that officers felt the need to leave their squad car at the bottom of Ms. Michaels's driveway due to its uneven surface, there is nothing in the record indicating that it would have been unsafe for Ms. Michaels to walk down her driveway and certainly nothing indicated that it would have constituted the substantial risk of injury to health or safety that would have justified a search for additional footwear under the *Holloway* standard. J.A. at 3-4. This is especially true given that Ms. Michaels was wearing footwear designed to prevent slipping and falling. J.A. at 4, 7.

Further, there was no risk to Michaels's dignity since she was already outside and wearing the clothing of her choice before the police arrived. J.A. at 4. Unlike in *DiStefano*, where a woman was arrested in a nightgown that was very likely to harm her dignity due to its nature as a piece of clothing intended to be worn in a private setting, Ms. Michaels willfully chose to go outside in a bikini top and shorts, which is clothing meant to be warn in a public setting and therefore very unlikely to be seen as degrading. *DiStefano*, 555 F.2d at 1094; J.A. at 4. Furthermore, in terms of dignity this case is also clearly distinguishable from *Titus*, where officers made the reasonable conclusion than an arrestee was presented with an imminent risk of dignitary harm by being arrested while completely naked, since Ms. Michaels was clothed and wearing clothing designed and intended to be warn in public settings. *Titus*, 445 F.2d at 578; J.A. at 4.

Since the facts do not indicate that Roddar was presented with an objective need to secure clothing for Ms. Michaels in order to protect her health, safety, or dignity and because Roddar's search lacked the established telltale signs of a good faith search, the proposed clothing exception, if adopted, would not be properly applied in this case.

In order to conserve space the conclusion has been excised.

Applicant Details

First Name	**Ian**
Last Name	**Roberson**
Citizenship Status	**U. S. Citizen**
Email Address	**pwn6tk@virginia.edu**
Address	**Address** **Street** **2101 Arlington Blvd Unit, Unit PV-346-A,B** **City** **Charlottesville** **State/Territory** **Virginia** **Zip** **22903** **Country** **United States**
Contact Phone Number	**6175436505**

Applicant Education

BA/BS From	**Colorado College**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Journal of Law & Technology**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Harmon, Rachel
rharmon@law.virginia.edu
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Schwartzman, Micah
schwartzman@law.virginia.edu
434-924-7848

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ian M. Roberson

2101 Arlington Boulevard Apt. 346, Charlottesville, VA 22903 | pwn6tk@virginia.edu | (617) 543-6505

June 1, 2023

The Honorable Stefan Underhill
U.S. District Court, District of Connecticut
Brien McMahon Federal Building and United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06004-4706

Dear Judge Underhill:

I am a rising third-year student at the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers. I expect to receive my J.D. in May 2024 and will be available to work any time after that.

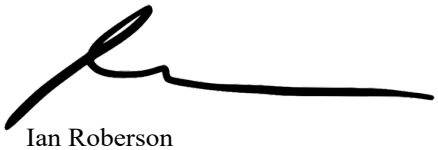
I am an openly gay law student and the first person in my family to go to law school. These experiences have helped me appreciate the importance of representation in the legal field. I want to use my legal career to serve as a model for aspiring LGBTQ lawyers.

Further, I was born and raised in Brookline, Massachusetts. New England is my home, and it is where I hope to return to practice. I hope that by clerking in your chambers, I can strengthen my connection to the New England legal market.

I have enclosed a copy of my resume as well as my law school transcript. I have also included a writing sample. Finally, letters of recommendation from Professors Rachel Harmon, Craig Konnoth, and Micah Schwartzman will be attached separately.

If you have any questions or need to contact me for any reason, please feel free to reach me at the above address and phone number. Thank you for your consideration.

Sincerely,



Ian Roberson

Ian M. Roberson

2101 Arlington Boulevard Apt. 346, Charlottesville, VA 22903 | pwn6tk@virginia.edu | (617) 543-6505

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2024

- *Virginia Journal of Law and Technology*, Executive Editor
- Lambda Law Alliance, Firm and Alumni Relations Chair
- Student Bar Association, Student Records Liaison
- First Amendment Clinic

Colorado College, Colorado Springs, CO
B.A., Political Science, with Distinction, *magna cum laude*, May 2021

- GPA: 3.94
- Fred A. Sondermann Award for overall achievement and contribution to the Political Science department
- Mock Trial, Team Captain

EXPERIENCE

King & Spalding, LLP, Washington, D.C.
Summer Associate, incoming, May 2023 – August 2023

Professor Craig Konnoth, University of Virginia School of Law, Charlottesville, VA
Research Assistant, June 2022 – present

- Researched and wrote analysis of historical legal treatment of sexuality for forthcoming article
- Edited, cited, and proofread law review submissions

The Rutherford Institute, Charlottesville VA
Legal Intern, June 2022 – August 2022

- Researched and wrote legal memoranda addressing civil liberties
- Drafted briefs and motions for trial and appellate level cases
- Prepared amici curiae briefs in the Fifth Circuit and at the Supreme Court analyzing constitutional questions including sovereign immunity and double jeopardy

Colorado College Office of Admission, Colorado Springs, CO
Admission Ambassador, May 2018 – May 2021

- Managed phone, email, and in person contacts with the Office of Admission
- Reviewed, labeled, and organized over 200 applicant files per day

Foundation for Individual Rights in Education, Philadelphia, PA
Intern, May 2020 – August 2020

- Researched campus speech policies and analyzed potential legal issues
- Wrote internal issue memoranda, advocacy toolkits, and online opinion pieces

U.S. Senator Edward Markey, Boston, MA
Constituent Services Intern, May 2019 – August 2019

- Conducted economic, telecommunications, and foreign policy research
- Managed constituent contacts, office data entry, and press conference preparation

INTERESTS

Digital music production, cooking, snowboarding

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Ian Roberson

Date: June 07, 2023
Record ID: pwn6tk

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	B+	Bamzai,Aditya
LAW	6002	Contracts	4	B+	Hellman,Deborah
LAW	6003	Criminal Law	3	A-	Coughlin,Anne M
LAW	6004	Legal Research and Writing I	1	S	Buck,Donna Ruth
LAW	6007	Torts	4	A-	Abraham,Kenneth S
		SPRING 2022			
LAW	6001	Constitutional Law	4	A-	Solum,Lawrence
LAW	6104	Evidence	4	A-	Mitchell,Paul Gregory
LAW	6005	Lgl Research & Writing II (YR)	2	S	Buck,Donna Ruth
LAW	6006	Property	4	B+	Nicoletti,Cynthia Lisa
LAW	9111	Sexuality and the Law	3	A+	Konnoth,Craig
		FALL 2022			
LAW	6102	Administrative Law	4	A-	Duffy,John F
LAW	7017	Con Law II: Religious Liberty	3	A-	Schwartzman,Micah Jacob
LAW	7009	Criminal Procedure Survey	4	A+	Harmon,Rachel A
LAW	8634	First Amendment Clinic (YR)	4	CR	Kalish,Ian C.
		SPRING 2023			
LAW	7788	Science and the Courts (SC)	1	B+	Rakoff,Jed S
		SPRING 2023			
LAW	8003	Civil Rights Litigation	3	A-	Frampton,Thomas Ward
LAW	8635	First Amendment Clinic (YR)	4	H	Weeks,Lin
LAW	7062	Legislation	4	A-	Nelson,Caleb E
LAW	7071	Professional Responsibility	2	A-	Faglioni,Kelly

June 12, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

I taught Ian in his second year of law school in my Criminal Procedure Survey course. This large course provides an overview of Fourth, Fifth, Sixth, and Fourteenth Amendment doctrines that regulate criminal investigation and adjudication. Like clerking, the course requires reading cases carefully and applying them to new situations. Also, like clerking, the course moves quickly through large amounts of legal material. Ian was a superb student and a pleasure to have in class. He was engaged, thoughtful, and prepared. The exam was longer than I intended, so it demanded that students understood the material, attack problems quickly, and write clearly under time pressure. Ian succeeded by all these metrics and earned a rare A+.

As his transcript suggests, Ian's performance in my class was no fluke. He has done well in law school, earning a 3.69 grade point average, putting him just outside the top decile of his class. But I think even this excellent record understates his performance. Ian's grades have gotten better each semester, as he adjusted to law school and the exam style it demands. He is both adaptable and persistent, and I think his performance in my course indicates that he will make a strong clerk.

Ian's strengths are not merely academic. He is personable and passionate about justice. He gets along well with his peers and is active in student groups, an understated leader rather than a flashy one. He has worked in a variety of settings and takes responsibility seriously. He will get along well in any chambers.

As you can see, I am positive about Ian. I encourage you to hire him. Please let me know if I can be of further assistance.

Sincerely,

Rachel Harmon

Rachel Harmon - rharmon@law.virginia.edu - (434) 924-7205

June 12, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

RE: Clerkship Letter of Recommendation for Ian Robertson

Dear Judge Underhill:

I write to recommend Ian Roberson for a clerkship with your chambers. Ian has been my student, research assistant, and has held board positions in student organizations I have advised. He has been truly impressive in every respect.

First, Ian was a student in my class, Sexuality Gender Identity, and the Law. Ian was the only first year student in the class, but I was impressed (and frankly, very surprised) at his grasp of the issues. Admittedly, Ian did not participate heavily during the class—but that was to be expected given that he was the only first year student, in a class heavily dominated by third year students. But I found Ian to always be extremely dedicated and prepared. His note-taking was leaps and bounds beyond that of his classmates—he followed every aspect of the discussion, remembered every class conversation, and always came prepared, with deep questions that were grounded in a close reading of the assigned texts. And while Ian did not participate heavily in the classroom, he made it a point to visit office hours with additional perspicacious questions.

Despite this favorable view of Ian, I was still extremely surprised with the sophistication and imaginativeness of his final project. Ian had proposed writing on free speech and transgender rights. I warned him that this was well trodden ground—many academics, since the 1990s, have argued that individuals have First Amendment interests in how they express their gender.

But Ian identified a sophisticated, nuanced, and inventive argument even in this area.
Ian began the paper where most free speech and trans rights scholars leave off: "it might be true that identity-affirming dresswear is protected conduct." But Ian was more interested in making a broader point. That is, First Amendment "doctrine itself has evolved in response to cases involving gender-expressive dress."

I had earlier expressed skepticism at the argument—how can one measure how a set of cases affects doctrine? And Ian, in his paper, acknowledge that "he distinction present might, at first blush, appear trivial. It is a disagreement over the extent to which First Amendment jurisprudence has shaped or been shaped by gender-expressive dress conduct." But, as Ian explains, "the centrality of transgender litigants in the development of expressive conduct doctrine" shapes the "open texture" of First Amendment rights. (Again, I was deeply impressed by a first year student's familiarity with H.L.A. Hart's work). Further, he notes, the focus on how "gay and lesbian marriage advocates" have shaped constitutional law, coupled with the "blind eye to similar advances made by transgender rights litigation minimizes the agency of transgender rights advocates, and trans people as a class."

But how exactly did trans advocacy shape First Amendment doctrine, and how could one trace the shaping of the doctrine to trans rights advocacy? Ian first explores the history of student speech cases starting with Tinker v. Des Moines. He concludes this history by observing that while courts have followed Tinker in defending students' rights to express their beliefs regarding political, religious, and other matters, "courts have historically been far less lenient with cases in which expressive clothing is understood to express a message only about its wearer's identity." (My emphasis). Ian then goes on to defend this claim by marching through several cases involving racial or cultural identity, a sort of "before" picture of the state of the doctrine, before transgender advocacy.

Ian then shows how in cases involving gender expression, a new trend began emerging, where courts became more attuned to First Amendment identity claims. The first cases involving gender expression involved non-transgender litigants—and this was important. To some degree, he argues, the early cases succeeded because "the clothing worn" by these cisgender plaintiffs "create meaning not because it necessarily conflict with the wearer's perceived gender [or sex assigned at birth]," as some would argue in the case of transgender litigants, "but because it expresse an affirmative message about their identity." He continues by looking to cases involving transgender individuals who relied on these earlier cases. Ian recognizes that his pool of cases is small. So he offers alternative hypotheses to explain his observations to explain why cases involving gender expression turned out differently from those involving racial and cultural expression—and considers the conclusions one can draw from that fact.

I largely agree with Ian's claims—mainly because they are nuanced and narrow. He recognizes that his claims might actually only apply to cases involving gender expression because of the distinctive ways race and culture are understood as "innate and inflexible." While I think that some of his analysis regarding earlier cases could do with more nuance on the distinction between belief and identity (for example, isn't the expression of political or religious belief also expression of identity?) the overall argument is sophisticated and persuasive.

Craig Konnoth - craig.konnoth@virginia.edu - (434) 924-7361

Ian's paper shows a sharp theoretical understanding of the issues at stake. But fundamentally, it is a doctrinal paper, showing how First Amendment cases evolved in new and interesting ways. Throughout, Ian showed an understanding of the procedural position of the cases and an excavation of documents that go beyond the usual first year skill set. For example, in various key cases, he cites from complaints and other docketed material. He also notes the difficulty of comparing cases in different procedural positions, and identifies a smaller subset of comparable cases, because the dispositions all occurred at the motion to dismiss stage.
In short, Ian's paper by far outstripped any of his classmates. Indeed, it may be one of the top three papers a student has ever written for me in this class.

After his stellar performance, of course, I asked Ian if he would be my research assistant. I have found Ian to be obliging, very timely, and extremely thorough. He has assisted on two articles, in both cases, responding on very short notice. Ian numbers among the most responsive research assistants I've had at UVA. His work on this front is particularly impressive given his extensive extra curricular work. Ian was part of a revamping of the Lambda Law Alliance governance, and took over alumni connections. The activity on that front has increased dramatically under his tenure.

Finally, I have particular respect for Ian because of his ability to engage opposing views and find common ground. His first summer, Ian worked for the Rutherford Institute, a conservative/libertarian leaning organization, in Charlottesville. The Institute is not a natural bedfellow with the organizations that I--and, I believe, Ian—is affiliated with. Yet, in conversations, Ian focused exclusively on the common ground he shared with his colleagues, and emphasized how positive his experience was. For example, he noted that the Institute shared goals with progressive groups, including expanding double jeopardy, and contracting sovereign immunity, protections respectively.

I recommend Ian unreservedly for a clerkship in your Chambers. Do not hesitate to contact me with any further questions.

Sincerely,

Craig J. Konnoth

Craig Konnoth - craig.konnoth@virginia.edu - (434) 924-7361

June 12, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

I am writing on behalf of Ian Roberson, who has applied for a clerkship in your chambers. Ian was a student in my course, Constitutional Law II: Religious Liberty, in the fall of 2022. Based on his work in that class, and on his overall record at UVA, I am confident that he will make an excellent clerk. Ian is smart, hard-working, gracious in his demeanor, and has shown a great willingness to work with others whose political and social commitments are very different from his own. That last virtue is often in too short supply these days. Ian is impressive in that regard, and I recommend him to you with great enthusiasm.

Ian was superb in my class on religious freedom last year. I had 72 students, including most of the top-25 in the second-year class. I allow a paper option instead of a traditional exam, and 20 students chose to exercise it. From that group, Ian's paper was among the more ambitious. He wrote about the implications of the Supreme Court's decision in Kennedy v. Bremerton School District, in which the Court announced that it had abandoned the Lemon test as a framework for interpreting the Establishment Clause of the First Amendment. Ian's paper attempts to understand the Court's new approach, which was presented in terms of "history and tradition." Finding that this methodology provides relatively little guidance, and rejecting a functional approach, Ian instead argues for a form of proportionality review, similar in some ways to the structure of judicial scrutiny employed by constitutional courts in Canada and Europe. This is an intriguing possibility, one that might help to make sense of First Amendment rights, even if this Court is not disposed to adopt it, as Ian realizes.

Ian's excellent performance in my class is consistent with his overall academic record. After four semesters, his cumulative GPA is 3.68, which puts him inside the top 20% of his class. He has taken a difficult course load, emphasizing public law courses involved in civil rights litigation. He has excelled in those, including a rare and notable A+ from Rachel Harmon in criminal procedure. His grades have improved year-over-year, and I would expect that he will continue to perform at a high level through graduation.

Ian's work is motivated by a broader commitment to civil rights, especially rights of free speech, religious free exercise, and sexual autonomy. He has interned for both the Rutherford Institute and the Foundation for Individual Rights in Education (FIRE). He currently serves on the board of Lambda Law Alliance, and wherever legal practice takes him, Ian will continue to be active in supporting the LGBTQ+ community.

On a personal note, if you decide to meet him, I think you will find that Ian is easy to talk with, friendly, and thoughtful. He wants to understand others and to build bridges, and he has put in the work to do just that. I am confident that he will be a team player, and that he will work well with anyone in chambers, even those with whom he might have real disagreements. He clearly values that ability and has demonstrated it over many years.

Ian Roberson has a bright career ahead of him in the law, and I hope you will give him careful consideration. If you have any questions, please feel free to reach me at 434-924-7848.

Sincerely,

/s/

Micah J. Schwartzman
Hardy Cross Dillard Professor of Law
Roy L. and Rosamond Woodruff Morgan
Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, Virginia 22903-1738
Phone: 434-924-7848
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EXPRESSIVE DRESS, EVOLVED LAW: Responding to Kosbie's Account of Gender-Expressive Dresswear Doctrine

Jeffrey Kosbie's *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*[1] argues that gender-expressive dresswear — clothing that converys a message about the gender identity of its wearer — is protected by the First Amendment expressive conduct doctrine. Kosbie advances two arguments. First, that the First Amendment value of autonomy supports a reading of free speech as protective of "gender nonconforming dress,"[2] and second, that such dress is protected within the contemporary expressive conduct framework.[3]

This article addresses Kosbie's second argument. I attempt to recontextualize Kosbie's conclusion that gender non-conforming dress is protected conduct by showing that cases involving gender-expressive dress conduct have themselves led to expansions of the expressive conduct doctrine. First Amendment doctrine protects gender-expressive dress because those same cases have reframed judges' thinking.

The distinction I present might appear trivial. It is a disagreement over the extent to which First Amendment jurisprudence has shaped or been shaped by gender-expressive dress cases. But framing matters; the reasoning underlying judicial determinations about the scope of rights shapes "what values the law embodies."[4] Doctrine does not exist independent of facts — it evolves in response to unique cases. In this case, development I describe in expressive conduct

[1] Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187 (2013).

[2] I quote "gender non-conforming" from Kosbie, who uses the term to mean dresswear that does not conform to observers' expectations of gender presentation. I use it interchangeably with "gender-affirming dress" and "gender-expressive dress," both of which I feel better represent the function of dresswear as understood by transgender individuals. Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 TULANE J.L. & SEXUALITY 123, 132 (2010).

[3] Kosbie, *supra* note 1, at 193.

[4] Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 564 (2019).

doctrine suggests that judges' understandings of the core values enshrined by the First Amendment have changed due to strategies employed by transgender rights advocates.

Framing is also important because it relocates agency. Gay and lesbian legal advocacy groups have made significant advances in the field of constitutional law.[5] This piece aims to highlight similar developments accomplished by pro-transgender rights advocates.

Finally, the framing of rights-based dialogues informs observers about how rights are exercised. Part II.3 discusses Kosbie's implicit assumption that gender-affirming dress worn by transgender people is subversive. A wide array of views exists within the transgender community on the relationship between dress and gender. While some transgender people might understand their conduct to be disruptive of the mainstream, others see themselves as essentially conforming to traditional gender stereotypes.[6] To implicate First Amendment protections, I argue, clothing does not have to be subversive.

I. First Amendment Protection of Expressive Conduct

[Part I summarizes the development of the expressive conduct doctrine as articulated in *Spence v. Washington*, 418 U.S. 405 (1974). It then reviews the Court's application of the doctrine to non-gender-expressive dresswear.]

II. Development of the Identity-Expressive Dress Doctrine

1. Free Speech Claims Involving Non-Gender-Expressive Dress

To illustrate the development of expressive dress doctrine, I first examine cases involving racially- and culturally-expressive dress. I compare the treatment of those cases to similar claims

[5] *See, e.g.*, *id.* at 559 (describing the gay rights movement's strategic position, while critiquing its deployment of assimilationist arguments). For examples of queer legal advocacy advancing constitutional law, *see, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

[6] Indeed, I argue the malleability in presentations and perceptions of gender might be one reason why transgender dress cases have so distinctly shaped free expression doctrine. *See infra* Part II.3.

that instead involve gender-expressive dress. In the former class of dress-conduct cases, courts have typically declined to afford litigants First Amendment protection. [7]

One of the earliest examples of identity-expressive dress doctrine is found in *New Rider v. Board of Education*, where the Tenth Circuit Court of Appeals upheld the suspension of three Native students because they wore their hair in braids.[8] While acknowledging that the hairstyles had "no religious significance," the students argued that they represented "old traditional ways."[9] According to them, the hairstyles had cultural import; the students wore them to "learn their culture," and to "be recognized as Indians" in public.[10]

Citing *Freeman v. Flake*,[11] in which the Tenth Circuit found that the First Amendment permitted public schools to regulate the length of male hairstyles, the *New Rider* panel upheld the District Court's dismissal of the students' case. That the plaintiffs in *Freeman* made "no claim . . . of any racial or religious discrimination" did not differentiate the case. Regardless of communicated content, the panel reiterated, "the wearing of long hair is not akin to pure speech."[12]

Similarly, in *Zalewska v. County of Sullivan*,[13] the District Court for the Southern District of New York dismissed a suit in which the state's Transportation Department ordered a female

[7] I use Gowri Ramachandran's definition of identity as characteristics that define one's self, be they chosen or unchosen. Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 32 (2006). Like Ramachandran, I decline to define identity as immutable. *Id.* at 20-21. For the purposes of my analysis, I will take litigants' statements about their own identity at face value.

[8] New Rider v. Bd. Educ. Indep. Sch. Dist., 480 F.2d 693, 696 (10th Cir. 1973), *cert. denied*, 414 U.S. 1097 (1973).

[9] *Id.* at 696.

[10] *Id.* at 696-97.

[11] 448. F.2d 258 (10th Cir. 1971).

[12] *New Rider* at 698. The court did not discuss expressive conduct. At the time of *New Rider*, Spence v. Washington, 418 U.S. 405 (1974), discussed *supra* Part I, had not been decided. Nor had Texas v. Johnson, 491 U.S. 397 (1989). This article makes no claim that *New Rider*'s holding is attributable wholly to hostility to claims involving racially-expressive dress. Rather, *New Rider* along with the cases discussed *infra* demonstrate an evolution in courts' thinking about expressive conduct as related to dress.

[13] 180 F. Supp. 2d 486 (S.D.N.Y. 2002).

Meals on Wheels vehicle driver to cease wearing a skirt while on the job, despite her objection that the policy restricted her "expression of a deeply held cultural value."[14] The court held that the driver's clothing was unprotected for two reasons: first, it "contain[ed] 'no written communication or symbols of any kind,'"[15] and second, that "no reasonable viewer could glean any message from the fact that [the driver] wore a skirt."[16]

Zalewska's analysis is two-fold. First, the court differentiates between clothing containing "communications or symbols" as message-expressive and clothing that does not contain such communications or symbols as message-less.[17] Indeed, while all clothing might communicate content, only some is so communicative as to merit First Amendment protection. Second, the court finds that, because of the claimed unintelligibility of the driver's message, no discernable message exists.[18] To the *Zalewska* court, the kinds of cultural values communicated by skirt-wearing are so amorphous that, without further context, they are unintelligible.

Bivens by Green v. Albuquerque Public Schools[19] provides a third illustration. There, a federal district court found the suspension of a Black student for sagging his pants to be constitutional. Bivens, the student, argued that sagging his pants represented "a statement of his identity as a black youth and [a] way for him to express his link with black culture and the styles of black urban youth."[20] In his view, the conduct was directly linked to an outward expression of identity. The court rejected that argument, and in a narrow ruling held that Bivens failed to demonstrate whether a triable issue of fact existed on the issue of the intelligibility of his

[14] *Id.* at 491.
[15] *Id.* (citing Hodge v. Lind, 88 F. Supp. 2d 1234, 1237 (D.N.M. 2000)).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 899 F. Supp. 556 (D.N.M. 1995)
[20] *Id.* at 558.

message.[21] The *Bivens* holding mirrors *Zalewska* — despite evidence offered by Bivens establishing the link between the pants sagging and Black American identity,[22] the court maintained that Bivens failed to demonstrate the existence of understandable communicative content to his message.[23]

The emphasis in the three cases on message intelligibility seems to cut against Kosbie's argument. The courts in acknowledge that dresswear always speaks to some extent about its wearer's identity. But they ultimately find that the message in question is so unclear that it cannot possibly constitute communicative expression.[24] The three holdings should be easily applied to gender-expressive dress. Although gendered clothing might tell observers something about the identity of its wearer, it is unlikely that message would be so clear as to impart onto the conduct First Amendment protection.

But under Kosbie's thesis — "[W]hen the government singles out gender nonconformity from other conduct, it suppresses expression"[25] — these cases should still come out differently. If gender-expressive dresswear is protected under the First Amendment framework, culturally- and racially-expressive dresswear should be afforded a similar, if not identical, treatment.[26]

Kosbie partially addresses the apparent incongruity. In *Zalewska*, he argues, "the state's interests are more plausibly unrelated to the message expressed" by plaintiff's dresswear.[27] But in the gender-related dress cases discussed *infra*, the government also cited non-message-related

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[21] *Id.* at 561.
[22] *Id.* at 561-62.
[23] *Id.*
[24] *Id.*; Zalewska v. Cnty. of Sullivan, 180 F. Supp. 2d 486 (S.D.N.Y. 2002).
[25] Kosbie, *supra* note 1, at 211.
[26] *Id.* at 196 ("Government suppression of gender nonconformity particularly infringes on the core free speech value of autonomy."); Ramachandran, *supra* note 7, at 36 ("[The] connection between freedom of dress and a notion that control over our own bodies is essential to human dignity."). If suppression of gender-expressive dress upsets closely held notions of autonomy and dignity, then suppression of racially- and culturally-expressive dresswear almost certainly do the same.
[27] Kosbie, *supra* note 1, at 213.

cases to justify suppression.[28] Further, that the state bars expressive conduct for reasons unrelated to its message does not alone make the proscription lawful.[29] The better explanation is that cases involving gendered dress have changed courts' minds.

2. Free Speech Claims Involving Gender-Expressive Dress

As more cases involving transgender and cross-dressing litigants arose, courts began to take a different tone. An early example is *City of Cincinnati v. Adams*.[30] There, the defendant, who was assigned male at birth,[31] was arrested for violating a municipal code prohibiting individuals from "appear[ing] in a dress or costume not customarily worn by his or her sex."[32] Adams was, at the time of the arrest, wearing a blouse, women's slacks, a long-haired wig, earrings, and carrying a purse.[33] The court rejected the ordinance as unconstitutionally vague.[34]

Adams, which Kosbie uses to illustrate how restrictions on "non-conforming" dress suppress message communication,[35] by no means represents a judicial about-face on identity-expressive dresswear. In fact, the court stated unequivocally: "we cannot conclude in this case that defendant's conduct is an expression within the contemplation of the First Amendment."[36] However, in conducting its due process analysis, the *Adams* court articulated a more nuanced understanding of the function of dress.

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[28] For example, in *McMillen v. Itawamba County School District*, the defendant county officials cited "anticipated and material disruption of the educational process" as a reason for prohibiting a female high school student from wearing a tuxedo to prom. Answer of Defendants to First Amended Complain at 2, McMillen v. Itawamba Cnty. Sch. Dist., 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010) (No. 1:10-cv-00061-GHD-JAD).

[29] In school-sponsored contexts, the restrictions must also be "reasonably related to legitimate pedagogical concerns." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

[30] 330 N.E.2d 463 (Hamilton Cnty. Mun. Ct. 1974).

[31] Because decisions are often unclear about the gender identity of litigants in cases involving gender-expressive dress, to the best of my ability I decline to use pronouns or other identity markers unless an individual's self-identification of gender is clearly specified.

[32] *Adams*, 330 N.E.2d. at 46.

[33] *Id.* at 49

[34] *Id.* at 51.

[35] Kosbie, *supra* note 1, at 189-92.

[36] *Id.* at 50.

According to the court, the invalidated prohibition "goes so far as to bring under suspect the woman who wears one of her husband's old shirts to paint lawn furniture, the trick or treater, the guests at a masquerade party, or the entertainer."[37] Plainly, the regulation is overbroad because the clothing worn by the painting woman, the trick or treaters, and the masquerade ball guests do not convey identity-communicative content.[38] We know that trick or treaters are not *actually* zombies, and we know that the furniture painter is wearing an old shirt to avoid dirtying her nice clothes. That is why the court's comparison works. But take a subway passenger. Context suggests that the clothes one wears on a morning commute can be understood to signal a certain raw, unfiltered identity. One's everyday clothes might tell us more about them than clothing that is worn with respect to external considerations (like on holidays, or for its functional utility). That a person wears a suit at a wedding does not alone suggest he is a well-dressed person, but doing so in a coffee shop might communicate differently. The *Adams* court seems to acknowledge this in its suggestion that the ordinance in question might prohibit even those activities we intuitively understand to convey no identity-based message.[39]

While *Adams* declined to address the First Amendment implications of the ordinance at issue, other courts have extended its analysis in expressive conduct cases. A U.S. district court in Mississippi took up a similar issue in *McMillen v. Itawamba County School District*,[40] holding that a lesbian high school student wearing a tuxedo to prom was engaged in protected expressive conduct.[41] The *McMillen* plaintiff succeeded on the argument that her tuxedo communicated a

[37] *Id.* at 51.
[38] Kosbie, *supra* note 1, at 204.
[39] *Id. But see* Rathert v. Village of Peotone, 903 F.2d 510 (7th Cir. 1990) (rejecting First Amendment claims by police officers disciplined for wearing earrings off duty).
[40] 702 F. Supp. 2d 699 (N.D. Miss. 2010).
[41] *Id.* at 705. One could argue that the court's language here is only dicta. In McMillen, the district court denied plaintiff's motion for a preliminary injunction, finding that it failed to show that the preliminary injunction would be in the interest of the public. *Id.* at 705-06. No authoritative holding was made on the free speech claim, as plaintiff

message about her identity.[42] Per the court: "The record shows that Plaintiff . . . intended to communicate a message by wearing a tuxedo and to express her identity through attending prom with a samesex date."[43] Such conduct, it held, "is the type of speech that falls squarely within the purview of the First Amendment."[44] Contrast this with *Zalewska* and *Bivens*, where plaintiffs using similar lines of reasoning were unable to prevail.[45]

One explanatory factor for the difference between these cases is the *McMillen* court's adoption of *Adams*-like reasoning. In this case, the action at issue (a woman wearing a tuxedo) communicated expressive content because of relevant social context. Simply, women do not usually wear tuxedos as formalwear. This logic mirrors *Adams* and suggests that courts more readily interpret gender-related dress in relation to its social context than they might for similar racial or cultural related actions.[46]

Of note: the court's determination that the tuxedo in *McMillen* was communicative did not rely on whether the tuxedo subverted plaintiff's gender identity. Rather, that the tuxedo expressed a message about who McMillen was (lesbian), and that imparted it with an intelligible meaning. This becomes important in cases involving transgender litigants, whose clothing is more easily understood to communicate a message about gender, not sexual, identity.

For example, in *Doe* ex rel. *Doe v. Yunits*,[47] a 2000 case from the Massachusetts Superior Court. Kosbie cites to *Yunits* for the proposition that current doctrine protects gender-expressive

ultimately settled. *McMillen v. Itawamba County School District*, ACLU (Nov. 5, 2010), https://www.aclu.org/cases/lesbian-and-gay-rights/fulton-ms-prom-discrimination.

[42] *Id.* at 703 ("[Plaintiff] wants to wear a tuxedo to the prom so that she can express . . . that 'it's perfectly okay for a woman to wear a tuxedo.'").

[43] *McMillen*, 702 F. Supp. 2d at 705.

[44] *Id.*

[45] *Zalewska* at 491-92; *Bivens* at 561.

[46] I contemplate possible explanations for this trend in Part II.3.

[47] Doe *ex rel.* Doe v. Yunits, 2000 WL 33162199, *1 (Mass. Super. Ct. Oct. 11, 2000), *aff'd*, 2000 WL 33342399 (Mass App. Ct.).

dress,[48] but the case also illustrates how courts have treated these claims differently from parallel race- and culture-based arguments.

In *Yunits*, a transgender student challenged the application of a school dress code that prevented her from wearing clothing consistent with her female gender identity.[49] In her complaint, plaintiff alleged that she "has a female identity and believes she is a girl" and that "[her] wearing clothing typically worn by girls is a statement and expression of who [she] is."[50] She argued that by preventing her from wearing typically-female clothing, the school violated her right to freedom of expression.[51] Specifically, she challenged the school's conclusion that allowing a transgender student to wear "girls' make-up, shirts, and fashion accessories" is so "disruptive or distractive to the educational process" as to justify the school's prohibition on such behavior.[52]

The court in *Yunits* found that the student's choice of dress is protected expressive conduct.[53] It reasoned that the dresswear at issue was expressive because it conveyed a message about Yuntis' identity. Said the court, "plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity."[54] By wearing clothing "traditionally associated with the female gender . . . she is expressing her identification with that gender."[55] This conclusion is further underscored by the complaint's language, which exclusively referred to Yunits using

[48] Kosbie, *supra* note 1, at 202. I do not dispute that point.
[49] *Yunits* at *1.
[50] Complaint at 6, Doe *ex rel.* Doe v. Yunits, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000) (No. 00-1060A).
[51] *Id.*
[52] *Yunits* at *1.
[53] *Id.* The court based its holding on the Massachusetts Declaration of Rights, Article XVI (now Article LXXVII). *Id.* The Declaration of Rights' free speech provision is very similar to that found in the First Amendment to the United States Constitution. *Compare* MA. CONST. pt. I, art. LXXVIII ("The right of free speech shall not be abridged") with U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech"). Further, the court in *Yunits* provides: "the analysis of [the Massachusetts Declaration of Rights, Article XVI] is guided by federal free speech analysis." *Yunits* at *1.
[54] *Yunits* at *3.
[55] *Id.*

feminine pronouns.[56] The court in *Yunits* had no choice but to decide the case with the understanding that the sole message conveyed by the clothing was: *I am a woman*. Even with that limitation, it found such message constitutive of expressive conduct.

Another of the few cases to address this issue is *Logan v. Gary Community School Corporation*, in which a transgender student was refused entry to her school's prom because she wore a dress.[57] The federal district court in *Logan* declined to grant the school's motion to dismiss.[58] The plaintiff later settled with the school district.[59]

Because no final ruling was made on the expressive nature of the student's prom dress, it is difficult to glean cohesive reasoning, much less precedential weight, from *Logan*. However, *Logan* might be an apt case for comparison: both *Bivens* and *Zalewska* involved motions to dismiss which were ultimately granted.[60] The *Logan* court acknowledged "the success of the parties' positions rests on the question of whether Logan's prom dress was [her] preferred form of personal self-expression."[61] On that question alone, the court believed plaintiff could make her case. That the school district settled might (though does not necessarily) lend to a conclusion that it too thought she had at least a small chance of success on the merits.[62]

The complaint filed in *Logan* is also illustrative. There, lawyers for Logan make clear that she has a "deeply rooted awareness of [herself] as feminine that is fundamental to [her]

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[56] Cited *supra* note 37.

[57] Logan v. Gary Cmty. Sch. Corp., 2008 WL 4411518, *1 (N.D. Ind. Sept. 25, 2008). Despite the court's reference to her as a "transgender male," the plaintiff in *Logan* was "a transgender student who presents as female but was assigned the sex designation of male at birth." *Id.* at *1; *Logan v. Gary Community School Corporation*, LAMBDA LEGAL, https://www.lambdalegal.org/in-court/cases/logan-vs-gary-community-school.

[58] *Logan* at *5.

[59] LAMBDA LEGAL, *supra* note 57.

[60] Bivens by Green v. Albuquerque Pub. Schs., 899 F. Supp. 556, 557 (D.N.M. 1995); Zalewska v. Cnty. of Sullivan, 180 F. Supp. 2d 486, 487 (S.D.N.Y. 2002).

[61] *Logan* at *4.

[62] Alternative explanations include the high cost of discovery and the potential for negative publicity.

identity."[63] Further, Logan's lawyers argued that her dresswear was protected expressive conduct, specifically because her gender identity was "communicated by Logan's feminine presentation."[64] The *Logan* complaint supplements the above-discussed denial of the motion to dismiss. It suggests that the court, on the complaint alone, believed sufficient facts existed to prove Logan's dress clearly communicated her self-identity, and that such communication constituted protected speech.[65]

3. Explanations for the Difference in Treatment

Thus far, I have developed a small but instructive line of cases involving identity-expressive dresswear. In cases involving racially- or culturally-expressive dresswear, courts have generally been less receptive to claims that dresswear which expresses its wearer's identity is protected by the First Amendment expressive conduct doctrine.[66] It is when courts begin to hear cases involving gender-expressive dresswear that the argument seems to gain a foothold.

So, Kosbie is not necessarily mistaken. I do not disagree that courts have generally suggested, if not completely recognized, that the current expressive speech doctrine applies to gender-expressive dresswear. But there is more going on. There are few practical differences between clothing that expresses racial or cultural identity and that which expresses gender; courts have nonetheless treated the two very differently.[67]

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[63] Complaint at 4, Logan v. Gary Cmty. Sch. Corp., 2008 WL 4411518 (N.D. Ind. Sept. 25, 2008) (Civ. Action No. 2:07-CV-431 JVB).

[64] *Id.* at 9.

[65] One area of potential disagreement: the complaint uses "he" and "him" pronouns in reference to Logan. *See id.* at 1 ("Logan expresses his deeply-rooted femininity through his appearance and manner."). This might suggest that Logan's lawyers did not *really* understand Logan to be a woman. But this argument makes my case stronger, by suggesting that courts are receptive to the gender-identity-as-inherently-expressive argument even when the expressed gender-identity does not track neatly onto a binary definition of gender. *See* discussion *infra* Part II.3 for an analysis of the strategic risks of defining gender-expressive conduct narrowly.

[66] *See* discussion *supra* Part II.1.

[67] *See* discussion *supra* Part II.1-2.

There are three ways to understand this trend. The first is implicit in Kosbie's argument: non-conformity highlights the expressive message of dresswear (or maybe, actually gives the dresswear an expressive message).[68] This explanation seems to be facially consistent with the cases involving gender-expressive dresswear, where the dresswear at issue does depart from traditional gendered expectations. But I find this explanation unconvincing. For one, *New Rider* and *Bivens* also involved non-conformity. In both cases, racial minorities used dresswear to express affiliation with their racial identity.[69] *Zalewska*, too, arguably contained an element of non-conforming expressive content. Even if her wearing of the skirt is not non-conformity so much as it is gender traditionalism, Zalewska's cultural belief is outside the mainstream.[70]

And the non-conformity explanation cannot capture all iterations of gender-expressive dress. While perhaps explanatory for cross-dressing cisgender plaintiffs, like that in *McMillen*, as applied to transgender litigants the non-conformity explanation assumes that transgender people are not really the identity the claim. Indeed, if we accept that transgender women are women, their donning women's clothing is in no sense non-conformist. The conformity explanation imbues into the gender-expressive dress doctrine an arbitrary line between cis and trans people of the same gender identity.

But in responding to Kosbie's implicit understanding of transgender identity as an expression of non-conformity, it is crucial not to swing the pendulum too far in the opposite direction. That is to say, a legal argument that proceeds, "cis and transgender women are women in the exact same sense" also fails. First, this is not how many transgender women understand

[68] *See* Kosbie, *supra* note 1, at 206 ("Gender nonconformity expresses a message because it noticeably violates a set of gender expectations.").

[69] *See* discussion *supra* Part II.1. Though maybe courts are willing to differentiate between subversion of individualized expectations and group expectations. That is, while sagging affirms Black identity, transgender dresswear disavows traditional expectations of gender performance.

[70] *See* discussion *supra* Part II.1.

themselves.[71] In fact, many trans women understand themselves to occupy a space in between — or, maybe, outside of — traditional binary understandings of gender.[72] Julia Serano makes the case that trans gender-identity is shaped both by internal understandings of self *and* a process of socialization that itself results from the decision to transition (Serano calls this one's "experiential gender").[73] It would be both impossible and inadvisable to attempt a conclusive review of trans identity theory; suffice it to say that although litigation often requires strategic compromise, a workable legal theory of gender identity must incorporate the practical and theoretical differences between cis and trans womanhood.[74] Thus, reasoning that accounts only for non-conformity is both incomplete and rife with practical difficulties.

A second alternative explanation for the differential legal treatment of gender-expressive dress looks to the centrality and accessibility of clothing as a gender identifier. Kosbie makes this argument himself. "We assume that we can reliably identify someone as male or female based on his or her appearance,"[75] he says. "Men look and act certain ways because they are men. Women look and act certain ways because they are women."[76] Our expectations of gender identity are shaped by visual cues that are both controllable and malleable in a way that race or cultural heritage are not. In plain language, this is easy for courts. It is easy for the judge in *Yunits* to see why dresswear that indicates femininity is essential to expressing a message of female identity. It is less easy for the *Bivens* judge to understand why sagging, a style of dress that can be worn by

[71] JULIA SERANO, WHIPPING GIRL 216 (2d ed. 2016).
[72] *Id.* at 219
[73] *Id.* at 222-24.
[74] *Id.* at 216-17. There are further strategic advantages to rejecting the innate-binary gender framework; Marie-Amélie George argues: "Positional compromise may be necessary in some situations, but not all . . . gender identity protections have fared best when they are part of the initial legislative package, instead of pursued as incremental gains." George, *supra* note 4, at 149.
[75] Kosbie, *supra* note 1, at 199.
[76] *Id. See also* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); Ramachandran, *supra* note 7.

anyone, speaks specifically to one's race. This explanation looks to perceived, not to actual, identity, which to some extent brings us right back around to the *Spence* intelligibility doctrine.[77] Although, our question now is how directly the chosen method of expression speaks to the identity expressed.

A final theory is that courts implicitly view gender as the product of personal choice. That is, while culture and race are innate and inflexible, gender identity is far more plastic. Some evidence for this theory can be found in the language of courts. *Yunits*, for example, refers to the expressive clothing as that which "plaintiff chooses to wear."[78] The *Logan* court consistently uses "he" pronouns to refer to the plaintiff, a trans woman,[79] suggesting that the court views the dress as inherently disconnected from its wearer's gender identity. Courts have been in the past reluctant to adopt immutability as a defining characteristic of sexuality.[80] Some queer legal advocates have rejected the immutability argument all together.[81] Potentially, there exists a far less unified understanding of the functional mechanics underlying one's sexuality and gender than those underlying racial or cultural identity.

Possibly the shape this argument takes — as a free speech issue — itself reinforces the notion of gender-expressive dress as choice. That a First Amendment analysis looks to the expressive content of conduct suggests active stance-taking. Message transmission rarely happens passively. In presenting gender-expressive dresswear as inherently communicative, some courts might understand the dress in question to reflect its wearer's choice of identity itself, while it in reality represents an *expression* of that identity.[82] It is ultimately impossible to know

[77] Spence v. Washington, 418 U.S. 405 (1974).
[78] Doe *ex rel.* Doe v. Yunits, 2000 WL 33162199, *6 (Mass. Super. Ct. Oct. 11, 2000).
[79] See, e.g., Logan v. Gary Cmty. Sch. Corp., 2008 WL 4411518, *2 (N.D. Ind. Sept. 25, 2008) ("On the night of Logan's senior prom, he arrived wearing a prom dress of the type normally worn by high school girls.").
[80] Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169, 184
[81] *See generally id.*
[82] *See* Ramachandran, *supra* note 7, for a discussion of the mutual reinforcement of dress and identity.

what the courts are thinking, but at least some evidence suggests that jurists' evolution in thinking actually reflects regressive attitudes about gender expression.

In all, that these cases have been able to move forward expressive conduct doctrine is productive. There are several First Amendment questions still unanswered by this line of cases, most relevantly whether the subversive character of an identity-based message is relevant to First Amendment analysis, and if so, the extent to which a message must subvert expectations of one's identity to be protective communicative speech.

Conclusion

The First Amendment prohibits the regulation of both speech and expressive conduct. Kosbie argues that the contemporary expressive conduct framework protects gender-expressive dresswear. He is right, but only because cases involving transgender litigants have shaped the courts' analysis on issues of gender-expressive dresswear.

[The remainder of the conclusion is omitted.]

Applicant Details

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Date of BA/BS	**May 2021**
JD/LLB From	**Boston College Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12201&yr=2011**
Date of JD/LLB	**May 15, 2024**
Class Rank	**Below 50%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Moot Court Team** **Wendall Grimes Moot Court (Top Oralist)**

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Prior Judicial Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 11, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
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Dear Judge Underhill:

I am a rising third-year law student at Boston College Law School writing to apply for a term-clerk position in your chambers.

Enclosed please find my resume, transcripts, and writing sample. In addition, you will receive three letters of recommendation from Professors Mary Bilder and Mary Ann Chirba, as well as Judge Debra Squires-Lee of the Massachusetts Superior Court. All recommenders have indicated their willingness to speak with you to answer any additional questions.

Should you require any further information, please contact me at (612) 704-9874 or at rockhold@bc.edu. I hope to discuss my qualifications with you in greater depth. Thank you for considering my application.

Respectfully,

Elijah Rockhold

ELIJAH ROCKHOLD

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EDUCATION

BOSTON COLLEGE LAW SCHOOL — Newton, MA
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Honors Thesis: "*Spending Time: Theorizing Neoliberal Influences on Shopping Malls, a Case Study of Jordan Creek Town Center*"
Study Abroad: Université Grenoble Alpes, Grenoble, France; School for International Training (various locations)
Activities: Faculty Committee for Academic Integrity; Resident Assistant; Admissions Ambassador; Writing Tutor

PROFESSIONAL EXPERIENCE

FREDRIKSON & BYRON, P.A. — Minneapolis, MN
Summer Associate — May 2023-August 2023

UNITED STATES ATTORNEY'S OFFICE, CRIMINAL APPEALS DIVISION — Boston, MA
Legal Intern — January 2023-May 2023
- Drafted substantive argument sections of a brief involving the application of a sentencing enhancement
- Researched and wrote memoranda on issues including mootness, abatement ad initio, and *Miranda* waiver

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS — Boston, MA
Judicial Intern, Hon. Marianne B. Bowler — August 2022-December 2022
- Prepared mediation materials, drafted opinions on the sufficiency of federal indictments and maritime law

MASSACHUSETTS SUPERIOR COURT — Boston / Brockton, MA
Judicial Intern, Hon. Debra Squires-Lee — May 2022-August 2022
- Drafted criminal and civil research memoranda, revised draft decisions, and researched procedural issues

U.S. STATE DEPARTMENT — Arlington, VA
Foreign Service Institute Intern (remote) — August 2020-July 2021
- Developed and edited exercises and grammar practices for foreign service officials learning French

OCEAN CITY BEACH PATROL — Ocean City, MD
Ocean Lifeguard — Summers 2018 and 2019

SELECTED RESEARCH AND PRESENTATIONS

Publications:
- *Doucet v. FCA*, Case Comment, Massachusetts Law Review (forthcoming 2023)
- "Law as Lore," Massachusetts Bar Association Section Review, Jan/Feb 2023
- "Migration and the Agency of Law: France and the 2015 Mediterranean Crisis," Center for Human Rights and International Justice, Winter 2023
- (submitted) "The Etymology of the Massachusetts Judge's Lobby," Boston Bar Journal

Presentations:
"Migration and the Agency of Law: France and the 2015 Mediterranean Crisis"
- Center for Human Rights Conference, Boston, MA (spring 2023)

"Contesting the State through Spatial Components of Protests: A Comparative Analysis"
- Iowa Human Rights Research Conference (spring 2021), Nelson Student Research Symposium (fall 2021)

LANGUAGE & INTERESTS

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FALL 2021 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2110	CRITICAL PERSPECTIVES IN LAW AND PROFESSIONAL IDENTITY	01	01	P
LAWS2120	CIVIL PROCEDURE	04	04	B
LAWS2130	CONTRACTS	04	04	B
LAWS2140	PROPERTY	04	04	A
LAWS2150	LAW PRACTICE 1	03	03	B+
MUSP2855	CHORALE CHAMBER CHOIR	00	00	S

			ATT	EARN	UNITS
TERM GPA:	3.333	TERM TOTALS:	16	16	15
CUM GPA:	3.333	CUM TOTALS:	16	16	15

SPRING 2022 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2125	CONSTITUTIONAL LAW	04	04	B+
LAWS2135	CRIMINAL LAW	04	04	B
LAWS2145	TORTS	04	04	A-
LAWS2155	LAW PRACTICE II	02	02	A-
LAWS8055	INTRO TO PRACTICE IN CJS	03	03	A-
MUSP2855	CHORALE CHAMBER CHOIR	00	00	S

			ATT	EARN	UNITS
TERM GPA:	3.432	TERM TOTALS:	17	17	17
CUM GPA:	3.386	CUM TOTALS:	33	33	32

FALL 2022 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2190	PROFESSION RESPONSIBILITY	02	02	A-
LAWS7750	CORPORATIONS	04	04	A-
LAWS9922	AMERICAN LEGAL HISTORY	03	03	A-
LAWS9996	EVIDENCE	04	04	B
MUSP2855	CHORALE CHAMBER CHOIR	00	00	S

			ATT	EARN	UNITS
TERM GPA:	3.464	TERM TOTALS:	13	13	13
CUM GPA:	3.408	CUM TOTALS:	46	46	45

SPRING 2023 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS6682	COMMERCIAL LAW: SECURED TRANSACTIONS	04	04	P
LAWS7799	INDEPENDENT STUDY	02	02	A
LAWS8250	GOVERNMENT EXTERNSHIP SEMINAR	01	01	P
LAWS8667	LEGAL PRACTICE EXTERNSHIP	04	04	P
LAWS9943	CRIMINAL PROCEDURE	03	03	B+

			ATT	EARN	UNITS
TERM GPA:	3.598	TERM TOTALS:	14	14	05
CUM GPA:	3.427	CUM TOTALS:	60	60	50

FALL 2023 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS4412	INTELLECT PROPERTY SURVEY	04	00	IN PROGRESS
LAWS6677	MERGERS/ACQUISITIONS	03	00	IN PROGRESS
LAWS7792	FEDERAL COURTS	03	00	IN PROGRESS
LAWS8830	SUPREME COURT EXPERIENCE	03	00	IN PROGRESS

			ATT	EARN	UNITS
TERM GPA:	0.0	TERM TOTALS:	13	00	00
CUM GPA:	3.427	CUM TOTALS:	73	60	50

TOTAL CREDITS EARNED : 60 CUM GPA : 3.427

END OF RECORD

ISSUED TO : ELIJAH ROCKHOLD
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Bryan D. Jones
University Registrar

June 11, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
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Bridgeport, CT 06604-4706

Dear Judge Underhill:

I write enthusiastically to recommend Elijah Rockhold for a judicial clerkship. I assure you that Elijah will be an asset to you and your chambers. He is sharp, focused, hard-working, intellectually curious, a good researcher and writer, and a pleasure to work with.

Elijah interned with me during the summer of 2022 while I sat in a criminal session in Plymouth County and in a civil session in Suffolk County Superior Court. Superior Court is the trial court of general jurisdiction in the Commonwealth of Massachusetts and the criminal sessions handle all felonies. In the criminal session, Elijah observed hearings, including bail hearings, dangerousness hearings, pleas, motions to suppress, and motions for new trial and we discussed each hearing at the end of the day. Elijah's questions and comments demonstrated keen insight into the issues. Elijah assisted me with legal research and drafted bench memoranda and draft opinions on Motions to Dismiss and Suppress. During the internship, Elijah's knowledge of criminal law and procedure grew rapidly. In the civil session, Elijah observed all manner of civil motions and trials.

Elijah demonstrated adept legal research and excellent writing skills. For example, Elijah researched the law governing dismissal of pending felony cases in which a defendant was found to lack competence and wrote a concise, clear, and well written draft opinion for my review. Elijah writes with confidence. He uses active verbs and is succinct – both necessary hallmarks of an excellent law clerk.

Finally, Elijah displayed the most important attributes for a law clerk – common sense, discretion, clear communication, and curiosity. I highly recommend Elijah for a clerkship, whether at the trial or appellate level. You will be glad you hired him. If you have any questions, please contact me at the below email.

Sincerely,
Debra A. Squires-Lee
Associate Justice, Massachusetts Superior Court
debra.squireslee@jud.state.ma.us

June 11, 2023

The Honorable Stefan Underhill
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Re: Clerkship Candidacy of Elijah Rockhold

Dear Judge Underhill:

Elijah Rockhold will be a superb judicial clerk. I have had the good fortune to have Elijah in two classes. He has an excellent intellect, an astute curiosity, and a passion for writing. Elijah is an invaluable student in class and I know would bring this commitment and excellence to a clerkship.

In the large property class in the fall of 2021, Elijah excelled. He received an A on a very challenging final. He performed particularly well on the complicated constitutional zoning and takings question. Elijah demonstrated a capacity to work through legal doctrine with deftness and with insight. In class, Elijah was always prepared, enthusiastic, and engaged. His comments always advanced the discussion and he could be relied on to contribute both needed basic summary analysis and also subtle interesting ideas. This semester in American Legal History, he has demonstrated the same strong classroom performance. Elijah consistently makes important and interesting contributions reflecting preparation and thought. In addition, he is an exceptionally strong writer. In the 26 required short responses to reading questions and reflections on class, Elijah repeatedly wrote in ways that carefully analyzed the reading or class—and then moved beyond class to show his independent thought and insight.

My colleague Professor Michael Cassidy had a similar experience in his criminal law class and evidence class. Professor Cassidy wrote me, “I think the world of Elijah. He was and is a star performer in class—his contributions are great and always advance the learning of everyone.”

In addition, Elijah engages with the world in a way that shows deep respect and interest. He has a real gift in connecting with people. He listens to what people are saying—and by that I mean that he really cares about understanding where people are coming from and why they think what they do. One can tell in watching him interact with others that people really enjoy being around him.

Elijah is terrific. For most law students, just getting through school is sufficient but Elijah has excelled in law school while also singing in the University Chorale of Boston College. This balance of excellent and passion characterizes everything he does. I hope that you will consider Elijah for a position in your chambers.

Sincerely,

Mary Sarah Bilder
Founders Professor of Law

Mary Bilder - bilder@bc.edu - 617-552-0648

June 11, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Re: Clerkship Candidacy of Elijah Rockhold

Dear Judge Underhill:

Please accept this letter in support of Elijah Rockhold's application for a judicial clerkship following his graduation from Boston College Law School in May 2024. I had the privilege and great pleasure of teaching Elijah throughout his 1L year in Law Practice I and II. Because this is a year-long, highly interactive program, Elijah and I have had many opportunities to speak about his professional objectives and personal aspirations. He is an outstanding young man and I recommend him with great enthusiasm and without reservation.

Boston College Law students describe our 1L Law Practice program as the most difficult part of their entire 1L curriculum – and for good reason. Typically, 1L doctrinal courses "go wide" by covering a broad range of cases and topics over the course of a semester. In contrast, our Law Practice curriculum takes the entire year to "go deep" by using just two cases per semester to teach the fundamentals of precise and comprehensive legal analysis, and effective and efficient written communication. The course does this by simulating legal practice and direct client representation. It places the student in the role of a junior associate advising a senior attorney about how to proceed in a client's case (Fall semester) or advocating on the client's behalf to a court (Spring semester). Research training is fully integrated throughout. All classroom discussions, memo assignments, research exercises, and individual conferences focus first and foremost on constructing and communicating a precise, efficient, and logically-sequenced analysis.

Whenever Elijah submitted a draft over the course of the academic year, I spent at least 1.5 to 2 hours going through it line by line. I identified and explained each successful point of analysis that worked well and explained why; I corrected large and small mistakes, demonstrated why each occurred, and explained how the corrected version did a better job of serving the busy reader's needs and expectations. Through multiple iterations of drafting and revising, Elijah learned why and how to get directly to the point, make it, support it and move on.

Elijah is determined to achieve professional excellence and he realizes that to do so, he must be an excellent writer. He knows that obtaining and incorporating critical feedback is essential. For many law students, understanding the importance of constructive criticism is a tough lesson to learn; owning mistakes and internalizing how to correct and avoid them going forward is even more challenging. For Elijah, however, this was never an issue. His attitude is not just refreshing; it is a kind of superpower. He is eager for feedback, welcomes it, thinks about it, incorporates it, and seeks additional critique. In fact, few students have been as overtly enthusiastic as Elijah when diving into the next assignment.

Because Elijah understands and embraces the need for continuous quality improvement, he has spent his time at B.C. Law pursuing every opportunity to improve and practice the fundamental skills of research, drafting, and editing, including interning with a federal judge and the appellate unit of the U.S. Attorney's Office.

Elijah's determination, discipline, and sheer enthusiasm for the law and the judicial process will make him an exceptional addition to your chambers and the work of the judiciary. Elijah is talented, hardworking, mature, and reliable. You will be able to trust him with difficult assignments and count on him to produce an excellent work product on time, if not early. Consequently, I can think of no law student more prepared or committed to contributing to a judge's chambers than Elijah.

For these reasons and more, I recommend Elijah Rockhold for a judicial clerkship most highly and without reservation. Please let me know if I may be of further assistance as you consider his application.

Thank you very much for considering his candidacy.

Most sincerely,

Mary Ann Chirba, J.D., D.Sc., M.P.H.
Professor of Law Practice
chirbama@bc.edu
508.320.5175

ELIJAH ROCKHOLD
193 Strathmore Rd. #10, Boston, MA 02135 | rockhold@bc.edu | (612) 704-9874

Writing Sample

Below is a draft opinion I prepared during my 1L summer while serving as an intern for Judge Squires-Lee in the Massachusetts Superior Court. Judge Squires-Lee asked me to research the competency evaluation cases and standards under Massachusetts General Laws Chapter 265 § 15(a). After hearing arguments during a hearing for the Motion to Dismiss, I prepared this draft opinion for the Judge. I have omitted identifying information and replaced Defendant's name with "Defendant."

Although the Judge edited the opinion before issuing her order, the draft below has not been edited by her or anyone else. I am submitting this draft with the permission of the Judge. I solely authored the below draft.

Defendant faces charges of assault and battery with a dangerous weapon and resisting arrest in violation of MASS. GEN. LAWS. ch. 265 § 15A(b) and ch. 268 § 32B, respectively. On June 7, 2019, the day after Defendant's arraignment, the Court (Gildea, J.) ordered Defendant to be evaluated by a qualified physician or psychologist, in accordance with MASS. GEN. LAWS. ch. 123 § 15(a), and to report whether mental illness or defect has so affected him that he is not competent to stand trial and/or that he is not criminally responsible for the charged offenses. In addition, Justice Gildea also required the Defendant to be hospitalized for observation and examination, pursuant to MASS. GEN. LAWS. ch. 123 § 15(b).

Defendant suffers from psychological difficulty, and experts generally agree his condition at least partially stems from being hit by a car at age 13 or 14. The extent and exact nature of the injury is unknown.

Now before the Court is Defendant's Motion to Dismiss ("Motion to Dismiss") in the interest of justice pursuant to MASS. GEN. LAWS. ch. 123 § 16(f). After careful review, the Motion to Dismiss is DENIED.

i. BACKGROUND

The Defendant was first evaluated on February 1, 2019, by Joshua Lapin, Psy. D. According to Dr. Lapin, Defendant, at the time of the interview, did "not possess sufficient ability to assist his attorney." Therefore, Dr. Lapin found Defendant incompetent to stand trial. He also diagnosed Defendant with "Unspecified Neurocognitive Disorder." Later in the report, regarding Defendant's ability to regain competency, Dr. Lapin seemed to suggest there was a possibility of his competency improving, particularly if Defendant could "practice" making rational decisions about legal concepts. Dr. Lapin suggested Defendant's lack of competency was at least partially related to Defendant's inability to rationally understand the legal proceedings against him. Thus,

if, in the future, Defendant could understand those proceedings to a more complete degree, he might be deemed competent to stand trial.[1]

On June 22, 2019, Defendant was again evaluated, this time by Jessica L. Surrett, Ph.D. Her report, dated June 26, 2019, notes Defendant could not understand the roles of the participants in the courtroom proceedings. Based on this observation, she opined, "[I]t remains unclear whether [Defendant] can be resorted to competency given his cognitive deficits." Dr. Surrett again met with Defendant, and in a report dated September 4, 2019, again determined Defendant suffers from an "Unspecified Neurocognitive Disorder" and that his deficits stem from "cognitive limitations." She further concluded he "did not demonstrate the abilities usually related to competence to stand trial...." Dr. Surrett wrote Defendant did not present "active symptoms of mental illness and did not require further hospitalization."[2] Dr. Surrett opined that Defendant could either be housed in a jail or community setting without "posing a substantial likelihood of harm to himself or others...due to mental illness." Regarding his future ability to stand trial, Dr. Surrett noted that it was "unclear whether Defendant can be restored to competency given his cognitive deficits."

On August 13, 2019, Karin D. Towers, J.D., Ph.D. met with Defendant and wrote, "it is my clinical opinion that further evaluation of his criminal responsibility for the alleged offenses is warranted as, given the diagnostic complexity of his presentation, it is certainly possible that his ability to appreciate the wrongfulness of his behavior and/or his capacity to conform his conduct to the requirement of the law may have been significantly negatively impacted by mental disease

---

[1] Dr. Lapin wrote:

> Regarding his ability to be restored to competence, [Defendant] has demonstrated the ability to learn information that he previously struggled with during his past evaluation periods, which is a positive development. That being said, he struggles to apply the information he has learned to his own case in regards to making rationally-based decisions. [Defendant] can possibly benefit from remediation in the form of giving him hypothetical situations to help him learn how to think about legal concepts and apply them to his own case; it is possible with ongoing practice of this skill that [Defendant] may be able to obtain this ability.

[2] On three separate occasions, Defendant was admitted to Bridgewater State Hospital, and each time was released.

or defect." Dr. Towers suggests, concurrent with other professionals who have evaluated Defendant, that his inability to stand trial is not related to a permanent physical disability but to a cognitive lack of understanding of proceedings. However, Dr. Towers noted that treatment might ameliorate his cognitive situation.

Dr. Heather Jackson performed the most recent evaluation of Defendant. In her report, dated December 14, 2020, Dr. Jackson opined that the defendant was not competent to stand trial. She recommended the incompetency determination to stand trial remain in place and, further, "that the court request a 15(a) evaluation in 6 months' time, to reassess Defendant's mental health and evaluate if he has made any improvements in his competence related abilities." This decision by Dr. Jackson, as she notes, is based on a short interview—which Defendant unexpectedly terminated—and on the other evaluations cited above.

Of the four clinicians that evaluated Defendant, none conclusively opined that he is unlikely ever to regain competency. While Dr. Surrett indicated he might not be able to regain competency, other clinicians expressed a possibility that, with treatment, Defendant may be able to regain competency to stand trial.

ii. **DISCUSSION**

Defendant moves to Dismiss in accordance with MASS. GEN. LAWS. ch. 123 § 16(f) ("16(f)"), which provides:

> If a person is found incompetent to stand trial, the court shall send notice to the department of correction which shall compute the date of the expiration of the period of time equal to the time of imprisonment which the person would have had to serve prior to becoming eligible for parole if he had been convicted of the most serious crime with which he was charged in court and sentenced to the maximum sentence he could have received, if so convicted.... On the final date of such period, the court shall dismiss the criminal charges against such person, or the *court in the interest of justice may dismiss the criminal charges against such person prior to the expiration of such period.*

Id. (emphasis added). In Sharris v. Commonwealth, 480 Mass. 586, 599 (2018), the Supreme Judicial Court ("SJC") considered the implication of 16(f) as applied to first-degree murder convictions and what factors may propel a judge to dismiss "in the interest of justice." The Court did not, however, provide explicit elements or interests a judge should weigh. Sharris, 480 Mass. at 599. Thus, neither the Legislature nor the SJC has given precise direction to how judges should balance the various factors before them in deciding a motion to dismiss "in the interest of justice." See id.

In Sharris, the Defendant had been found to be incompetent to stand trial since the time of his arraignment and continued to be incompetent twenty-three years later, at the time of the appeal in front of the SJC. Id. at 590. Both the Defendant and Commonwealth conceded that the Defendant would never be competent to stand trial. Id. at 589. Additionally, the Defendant was extremely frail and weak at the time of appeal, which mitigated any fears about a danger to the community. Id. at 590. In considering dismissal pursuant to 16(f), the SJC recognizes at least two statutory purposes: (i) "protecting mentally ill defendants from the indefinite pendency of criminal charges..." and (ii) "protecting the public from potentially dangerous persons." Id. at 598. However, in the same paragraph, the SJC notes releasing a defendant "in the interest of justice" (which it called the statute's "safety valve") was warranted where "the defendant's chances of being resorted to competency are slim." Id. (quoting Commonwealth v. Calvaire, 476 Mass. 242, 246 (2017)). Therefore, the Court indicated the "interest of justice" provision is narrowly tailored and highly fact specific.

In Calvaire, the Defendant had been deemed incompetent to stand trial for nearly seventeen years. 476 Mass. at 245. In assessing the Commonwealth's argument that the Defendant may regain competency at some point in the future, the Court relied on a medical report providing his

chances of being restored are "slim" and referencing the years of continued evaluations and little progress. Id. at 247.

Finally, in Foss v. Commonwealth, 437 Mass. 584, 585 (2002), the Defendant had been deemed incompetent since his indictment, and continuously for the nine years before appeal. The Court did not specifically address the factors that would justify releasing a defendant "in the interest of justice." Foss, 437 Mass. at 589. The Court provided a compelling policy rationale: the statute's design is to eliminate committing and holding incompetent defendants "while awaiting their unlikely restoration to competency." Id.

In the three cases where the SJC has considered the "interest of justice" provision under § 16(f), it has not provided specific factors a motion judge should consider. Instead, the decisions are highly fact-specific and based on conclusions the defendants were unlikely or completely unable ever to regain competency to stand trial. See Sharris, 480 Mass. at 589; Calvaire, 476 Mass. at 247; Foss, 437 Mass. at 585. See also Commonwealth v. Santiago, No. 1981CR00098, 2021 WL 4192370, at *4 (Mass. Super. Aug. 23, 2021) (holding "because there is essentially no chance that [Defendant] will ever become competent," the motion to dismiss was allowed).

Here, Defendant may well fit into these factual scenarios. However, at the time of this decision, only three years have passed since his initial evaluation, and no doctor has indicated Defendant will never be competent to stand trial. Additionally, at least one expert opined Defendant's competency could be restored if he continues with treatment and education. Further, since April 2022, Defendant has been on a new course of treatment, including consultation with a social worker, prescription injections, and adult foster care, which seem to be yielding positive results. Additional time may prove those treatments beneficial to a restoration of competency.

iii. CONCLUSION

Because no clinician has evaluated that Defendant is unlikely to regain competency to stand trial, and because his new treatment may result in competency in the future, the Motion to Dismiss is DENIED.

Applicant Details

First Name	**Seth**
Last Name	**Rosenberg**
Citizenship Status	**U. S. Citizen**
Email Address	**sethros@pennlaw.upenn.edu**
Address	**Address** Street **215 E 95 St, Apt 26 J** City **New York** State/Territory **New York** Zip **10128** Country **United States**
Contact Phone Number	**6469327391**

Applicant Education

BA/BS From	**State University of New York-Binghamton**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**June 1, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Asian Law Review** **University of Pennsylvania Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Wolff, Tobias
twolff@law.upenn.edu
215-898-7471

Burbank, Stephen
sburbank@law.upenn.edu
(215) 898-7072

Struve, Catherine
cstruve@law.upenn.edu
215-898-7068

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Seth Rosenberg

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

May 31, 2023

The Honorable Stefan R. Underhill
United States District Court
District of Connecticut
Brien McMahon Federal Building and United States Courthouse
915 Lafayette Boulevard
Bridgeport, Connecticut 06604-4706 United States

Dear Judge Underhill:

I am writing to express my interest in the clerkship position commencing in September of 2024. Currently, I am a first-year associate at Quinn Emanuel Urquhart & Sullivan, LLP in their New York office and, as of this August, I will have the privilege of clerking for Judge Harris Hartz of the Tenth Circuit.

My application to your chambers is motivated by several factors. As an aspiring litigator, I am eager to deepen my understanding of motion practice, the discovery process, trial court decision-making, and civil procedure in general. A district court clerkship aligns seamlessly with my professional objectives. Additionally, I anticipate that this experience will build upon my future appellate clerkship, offering me a comprehensive understanding of the judiciary—a fundamental asset for effective advocacy.

Furthermore, from 2024 through 2026, the timespan of this clerkship, my partner will be studying at the School of Drama at Yale, and it is important for me to be in or near the same city as her. I also value staying close to my family and being part of a substantial Jewish community. Moreover, the accessibility to open spaces in Bridgeport, named “Park City,” is an added attraction, as I am an avid walker. Therefore, a clerkship in Bridgeport, Connecticut presents itself as an ideal opportunity.

Enclosed are my resume, law school transcript, undergraduate transcript, and a writing sample. I have also included letters of recommendation from Professor Stephen B. Burbank (sburbank@law.upenn.edu, 508-246-8674), Professor Tobias Barrington Wolff (twolff@law.upenn.edu, 215-898-7471), and Professor Catherine T. Struve (cstruve@law.upenn.edu, 215-898-7068). If you require any further information to assist in your evaluation of my application, please do not hesitate to let me know.

I appreciate your consideration and look forward to the possibility of further discussions.

Respectfully,

Seth Rosenberg

SETH ROSENBERG

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

EDUCATION

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, PA
J.D., *magna cum laude*, May 2022
Honors: Dean's Prize, awarded to students obtaining the highest grades in the 1L year
University of Pennsylvania Law Review, Senior Editor
Asian Law Review, Associate Editor
Credited for research in Stephen Burbank & Sean Farhang, *Class Certification in the U.S. Courts of Appeals: A Longitudinal Study*, 84 L. & CONTEMP. PROBS. 73, 73 (2021)

Activities: Jewish Law Students Association, Board Member
Disabled & Allied Law Students Association, Founding Board Member
Teaching Assistant, Civil Procedure
Host, Law Review Online Podcast

THE STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, Binghamton, NY
B.A., *summa cum laude*, Philosophy, Politics, and Law, June 2018
Honors: Phi Beta Kappa
Activities: The Pipe Dream, Staff Writer
Critical Thinking Lab, Consultant

EXPERIENCE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, Albuquerque, New Mexico Starting August 2023
Incoming Law Clerk to the Honorable Harris L. Hartz

QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York September 2022-Present
Associate

- Performed legal research and writing for securities litigation matters and Section 230 claim.
- Researched and summarized various new avenues of business, with a particular focus on issues related to cryptocurrency.

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, Pennsylvania May 2020-September 2020
Research Assistant for Professor Stephen Burbank

- Researched the relationship between the Supreme Court and other federal courts, with a focus on the Courts of Appeals.

Research Assistant for Professor Tobias Barrington Wolff

- Researched the enforcement of injunctions by a federal district court different from the one that issued the injunction.

KAPLAN TEST PREP, Valley Stream, New York February 2019-July 2019
LSAT Instructor

- Through rehearsed lectures, and the administration of practice tests, ensured students were prepared for exam day.

WILLIAMS & CONNOLLY LLP, Washington, DC June 2018 - December 2018
Paralegal I

- Reviewed and categorized documents for use as deposition exhibits; assembled materials for client interviews and court appearances and facilitated litigation-related communications.

NEW YORK CITY CRIMINAL COURT, BRONX COUNTY, New York, New York June 2016 – July 2016
Judicial Intern to the Honorable Judge Anne Scherzer

- Observed several court cases; learned the process behind cross-examination, court proceedings, and general court etiquette.

THE CANDY AND COSMETIC DEPOT, Far Rockaway, New York Summers 2014 and 2016
Operations and Logistics Analyst

- Priced, listed, and packaged hundreds of items over the course of two summers and checked and maintained inventory.

INTERESTS

- Swimming, reading John Steinbeck, meditation, chess, perfecting my turkey sandwich recipe.

Record of: Seth Nathan Rosenberg
Penn ID: 23098008
Date of Birth: 23-OCT
Date Issued: 17-MAY-2023

U N O F F I C I A L Page: 1

The University of Pennsylvania

Level:Law

Primary Program
Program: Juris Doctor
Division : Law
Major : Law

Degree(s) Awarded Juris Doctor 16-MAY-2022
Magna Cum Laude
Program : Juris Doctor
Division : Law
Major : Law

SUBJ	NO.	COURSE TITLE	SH	GRD	R
INSTITUTION CREDIT:					
Fall 2019					
Law					
LAW	500	Civil Procedure (Burbank) - Sec 2	4.00	A+	
LAW	502	Contracts (Katz) - Sec 2A	4.00	A	
LAW	504	Torts (Hoffman,A) - Sec 2	4.00	A	
LAW	510	Legal Practice Skills (Govan) - Sec 2A	4.00	CR	
LAW	512	Legal Practice Skills Cohort (Wigler)	0.00	CR	
Ehrs: 16.00					
Spring 2020					
Law					
LAW	501	Constitutional Law (Berman) - Sec 2	4.00	CR	
LAW	503	Criminal Law (Heaton) - Sec 2A	4.00	CR	
LAW	510	Legal Practice Skills (Govan) - Sec 2A	2.00	CR	
LAW	512	Legal Practice Skills Cohort (Wigler)	0.00	CR	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	SH	GRD	R
Institution Information continued:					
LAW	583	Judicial Decision-Making (Scirica)	3.00	CR	
LAW	598	Financial Regulation (Sarin)	3.00	CR	
Ehrs: 16.00					
Summer 2020					
Law					
LAW	855	Law Meets M&A Bootcamp Competition	2.00	CR	
Ehrs: 2.00					
Fall 2020					
Law					
GAFL	611	Stats for Public Policy	3.00	P	
GAFL	621	Public Economics	3.00	P	
LAW	508	Property (Parchomovsky)	3.00	A-	
LAW	602	Employee Benefits (Lichtenstein/Zimmerman)	2.00	A-	
LAW	802	Law Review - Associate Editor	1.00	CR	
LAW	832	Asian Law Review - Associate Editor	0.00	CR	
LAW	999	Research Assistant (Wolff)	1.00	CR	
LAW	999	Teaching Assistant (Burbank)	2.00	CR	
Ehrs: 15.00					
Spring 2021					
Law					
GAFL	651	Public Finance and Public Policy	3.00	A	
GAFL	732	Public Management and Leadership	3.00	A	

********** CONTINUED ON PAGE 2 **********

Record of: Seth Nathan Rosenberg
Penn ID: 23098008
Date of Birth: 23-OCT
Date Issued: 17-MAY-2023

U N O F F I C I A L Page: 2

The University of Pennsylvania

Level:Law

SUBJ	NO.	COURSE TITLE	SH	GRD	R
Institution Information continued:					
LAW	638	Federal Courts (Struve)	4.00	A-	
LAW	802	Law Review - Associate Editor	0.00	CR	
LAW	832	Asian Law Review - Associate Editor	1.00	CR	
LAW	999	Independent Study (Wolff)	3.00	A-	
Ehrs: 14.00					
Fall 2021					
Law					
LAW	555	Professional Responsibility (Hickok)	2.00	A+	
LAW	622	Corporations (Pollman)- Sec 2	4.00	A-	
LAW	650	Civil Practice Clinic Tutorial (Rulli)	2.00	A-	
LAW	652	Civil Practice Clinic: Fieldwork (Rulli)	4.00	A-	
Ehrs: 12.00					
Spring 2022					
Law					
LAW	560	Lawyering and Technology (Wolson)	2.00	A	
LAW	565	Army War College International Strategic Crisis Negotiation (Knoll)	2.00	CR	
LAW	608	Blockchain and the Law (Tosato)	3.00	A	
LAW	631	Evidence (Rudovsky)	4.00	A-	
Ehrs: 11.00					

********** CONTINUED ON NEXT COLUMN **********

********** TRANSCRIPT TOTALS **********

	Earned Hrs
TOTAL INSTITUTION	86.00
TOTAL TRANSFER	0.00
OVERALL	86.00

********** Comments **********

In response to the COVID-19 pandemic, specific divisions within the University of Pennsylvania granted alternate grading options for academic terms that were impacted. See COVID-19 Alternate Grading Policies in the Archives of University Catalogs for details.

Senior Writing Requirement - fulfilled through Independent Study (Wolff); Public Service Requirement Satisfied;

DEAN'S PRIZE, awarded to the students attaining the highest grade point averages for the work of the first year;

Participant, Ninth Annual Intramural Mock Trial Tournament, Spring 2020;

********** CONTINUED ON PAGE 3 **********

Record of: Seth Nathan Rosenberg
Penn ID: 23098008
Date of Birth: 23-OCT
Date Issued: 17-MAY-2023

U N O F F I C I A L Page: 3

The University of Pennsylvania

Level:Professional

Primary Program
Program: Master of Public Administration
Division : College of Liberal and Professional Studies
Professional Masters Programs
Major : Government Administration-FELS

SUBJ NO.	COURSE TITLE	CU	GRD	R

INSTITUTION CREDIT:

Fall 2020
Law

GAFL 611	Stats for Public Policy	1.00	P
GAFL 621	Public Economics	1.00	P

Ehrs: 2.00

Spring 2021
Law

GAFL 651	Public Finance and Public Policy	1.00	A
GAFL 732	Public Management and Leadership	1.00	A

Ehrs: 2.00 GPA-Hrs: 2.00 QPts: 8.00 GPA: 4.00

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	4.00	2.00	8.00	4.00
TOTAL TRANSFER	0.00			
OVERALL	4.00	2.00	8.00	4.00

********** Actions **********
Withdrew 11-MAY-21

********** Comments **********
In response to the COVID-19 pandemic, specific divisions within the University of Pennsylvania granted alternate grading options for academic terms that were impacted. See COVID-19 Alternate Grading Policies in the Archives of University Catalogs for details.
********** END OF TRANSCRIPT **********

BINGHAMTON UNIVERSITY
STATE UNIVERSITY OF NEW YORK

OFFICE OF THE REGISTRAR
State University of New York at Binghamton
Binghamton, New York 13902-6000

Record of: Seth N Rosenberg
Date Issued: 15-SEP-2021
Level: Undergraduate

Page: 1

Date of Birth: 23-OCT-1996
Student ID: B00516992
SSN: *****9709

Issued To: SETH ROSENBERG
859 CRESTVIEW AVE
REFNUM:59861640
VALLEY STREAM, NY 11581-3117

Transcript key:
https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

Course Level: Undergraduate
First Admit: Fall 2014
Last Admit: Fall 2015

Current Program
Bachelor of Arts
Program : Harpur Bachelor of Arts
College : UG Harpur
Major : BA Philosophy Politics and Law

Degree Awarded Bachelor of Arts 20-MAY-2018
Primary Degree
Program : Harpur Bachelor of Arts
College : UG Harpur
Major : BA Philosophy Politics and Law
Inst. Honors: Summa Cum Laude

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
201590		Advanced Placement EXM				
CHEM	101	Intro To Chemistry I	4.00	T		
ECON	162	Principles Of Macroeconomics	4.00	T		
HIST	1XX	1XX Level Course	4.00	T		
HUM	XXX	Humanities Elective	4.00	T		
MATH	1XX	100+ Level Course	4.00	T		
MATH	221	Calculus I	4.00	T		
PLSC	111	Intro To Amer Politics	4.00	T		
SOCS	XXX	Social Science Elective	4.00	T		
Ehrs: 32.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
INSTITUTION CREDIT:						
Fall 2015						
UG Harpur						
BA Philosophy Politics and Law						
AAAS	284B	Modern India 1757-2000	4.00	A	16.00	
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
PHIL	107	Existence and Freedom (LEC)	4.00	A	16.00	
PSYC	111	General Psychology	4.00	A	16.00	
WRIT	111	Coming to Voice	4.00	A	16.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 64.00 GPA: 4.00						
Dean's List						
Good Standing						
Spring 2016						
UG Harpur						
BA Philosophy Politics and Law						
HIST	103A	Foundations Of America (LEC)	4.00	A	16.00	
HIST	225	Imperial Russia	4.00	A	16.00	
PHIL	140	Intro To Ethics	4.00	A	16.00	
THEA	102	Introduction To Theater	4.00	A	16.00	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 64.00 GPA: 4.00						
Dean's List						
Good Standing						
Fall 2016						
UG Harpur						
BA Philosophy Politics and Law						
HIST	325	Red Phoenix: Revolution & USSR	4.00	A-	14.80	
PHIL	146	Law & Justice (LEC)	4.00	A-	14.80	
PHIL	147	Markets, Ethics And Law (LEC)	4.00	A	16.00	
PLSC	340	Public Opinion	4.00	A-	14.80	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 60.40 GPA: 3.77						
Dean's List						
Good Standing						
Spring 2017						
UG Harpur						
BA Philosophy Politics and Law						
ASTR	114	Sun, Stars And Galaxies	4.00	A	16.00	
ASTR	115	Observational Astronomy Lab	1.00	A	4.00	
HIST	374	China In The 20th Century	4.00	A	16.00	
PHIL	345	Philosophy Of Law	4.00	A	16.00	
PLSC	323	Congress In Amer Politics	4.00	A-	14.80	
Ehrs: 17.00 GPA-Hrs: 17.00 QPts: 66.80 GPA: 3.92						
Dean's List						
Good Standing						
********** CONTINUED ON PAGE 2 **********						

Amber Stallman, Director of Financial Aid and Student Records
Transcript Legend: https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

BINGHAMTON UNIVERSITY
STATE UNIVERSITY OF NEW YORK

OFFICE OF THE REGISTRAR
State University of New York at Binghamton
Binghamton, New York 13902-6000

Record of: Seth N Rosenberg
Date Issued: 15-SEP-2021
Level: Undergraduate

Date of Birth: 23-OCT-1996
Student ID: B00516992
SSN: *****9709

Transcript key:
https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Fall 2017						
UG Harpur						
BA Philosophy Politics and Law						
HIST	380D	Global Early American Republic	4.00	A	16.00	
HWS	210	Men's Personal Wellness	4.00	A	16.00	
PHIL	456C	Justice and Gender	4.00	A	16.00	
PHIL	497	Critical Thinking Pedagogy	1.00	A	4.00	
PLSC	389W	Political Parties	4.00	A	16.00	
Ehrs: 17.00 GPA-Hrs: 17.00 QPts: 68.00 GPA: 4.00						
Dean's List						
Good Standing						
Spring 2018						
UG Harpur						
BA Philosophy Politics and Law						
ENG	360R	Romanticism	4.00	A	16.00	
HWS	110	Taekwondo	2.00	A	8.00	
PSYC	391	Practicum In College Teaching	4.00	P	0.00	
THEA	391	Practicum In College Teach I	4.00	A	16.00	
Ehrs: 14.00 GPA-Hrs: 10.00 QPts: 40.00 GPA: 4.00						
Good Standing						
Last Standing: Good Standing						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	96.00	92.00	363.20	3.94
TOTAL TRANSFER	32.00	0.00	0.00	0.00
OVERALL	128.00	92.00	363.20	3.94

********** END OF TRANSCRIPT **********

Amber Stallman, Director of Financial Aid and Student Records
Transcript Legend: https://www.binghamton.edu/registrar/student/transcripts/transcript-key.html

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

May 31, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Re: Clerkship Applicant Seth Rosenberg

Dear Judge Underhill:

It is my pleasure to offer Seth Rosenberg an enthusiastic recommendation for a clerkship in your chambers. Seth is a smart young man with a superb work ethic and a focused analytical mind. He is very well suited to the work of a judicial clerk and will do superb work in whatever chambers snaps him up. I encourage you to take a close look at Seth in the application and interview process.

I have not worked with Seth in a classroom setting. Rather, he has served as a research assistant for me and is now writing a paper under my direction as an independent study. Because of the pandemic and the physical separation it imposed, our work together has been remote — I have not met Seth in person. But that limitation does not qualify the confidence of my recommendation. Seth is a very talented lawyer-in-training.

Seth and I began working on a research project after my friend and colleague Steve Burbank urged me to get to know him. The project on which I requested his assistance is an analytically complex one. I am working on an article about the enforcement of consent decrees entered in one federal district court by another federal court in a different location. The issue draws together questions of subject-matter jurisdiction, federal common law, choice of law and remedies doctrine. I walked Seth through the elements of the analysis that I wanted to explore and described the types of materials I wanted his help in gathering so I could canvas the full range of judicial treatments of this constellation of issues. In short order, Seth produced an excellent research file that included a comprehensive set of cases, some representative academic treatments of the issue, and a substantial annotated description of the materials he had gathered and how they might be useful. It was as good a research file as any I have received from a student.

Seth subsequently asked whether I would supervise his work on an independent study writing a paper about the Supreme Court's decision in Rodriguez v. FDIC (2020), a case in which the Court took an ungenerous approach to the role of federal common law in bankruptcy proceedings. As with the research materials Seth helped me gather, this was an analytically complex project in which Seth set out not only to critique the Court's reasoning as a matter of doctrine but to suggest an alternate approach to framing the role of federal courts in developing federal common law. We have met several times to talk about the project and each time I have been impressed with the ambitious scope of his interests and the methodical quality of his thinking. As of this writing, Seth is still early in the process of drafting the paper but what I have seen thus far already carries the promise of a first-rate piece of work.

In short, Seth Rosenberg has analytical chops. He has the talent, the discipline and the work ethic to do superb work in the most demanding chambers. He has earned the opportunity to develop a relationship with a wonderful judge, and I am delighted to lend him my strong recommendation.

Please do not hesitate to let me know if I can be of any further help in your review of Seth's candidacy.

Very truly yours,

Tobias Barrington Wolff
Jefferson Barnes Fordham Professor of Law
Deputy Dean, Alumni Engagement and Inclusion
Tel.: 415.260.3290
Email: twolff@law.upenn.edu

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May 31, 2023

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United States Courthouse
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Bridgeport, CT 06604-4706

Re: Clerkship Applicant Seth Rosenberg

Dear Judge Underhill:

I am delighted to recommend Seth Rosenberg for a clerkship in your chambers. Seth was my student in Civil Procedure and my advisee. He served as my Research Assistant during the summer after his first year, and as my Teaching Assistant in Civil Procedure last Fall. We have talked for hours, and I have a very good sense of his abilities and potential.

Seth came to Penn Law from SUNY Binghamton, where he compiled a stunning academic record, majoring in Philosophy, Politics, and Law, and graduating summa cum laude as a member of Phi Beta Kappa.

My course in Civil Procedure is generally regarded as the most challenging in the first-year curriculum. The doctrinal material alone includes very difficult concepts, but I expect my students to bring to their study of the cases perspectives (from, e.g., history, economics, and political science) that will enable them to get behind the doctrine. I also introduce them to, and expect them routinely to consider, questions of litigation strategy. I call on students “cold” (without prior notice), and I engage them in discussion for twenty minutes or so during each tour of the class.

Seth was the first student I called on during the first class of the Fall 2019 semester. That is not an enviable position to be in, particularly because the course begins with Sibbach v. Wilson, a notoriously difficult case in which the Supreme Court first interpreted the Rules Enabling Act of 1934. I remember this only because Seth’s performance on that occasion was arrestingly good. He had not only mastered the facts of the case and the doctrine. He had obviously thought a good deal about the policy implications of the Court’s decision. I was impressed, as I continued to be throughout the course.

In light of the grasp of the course material that Seth demonstrated in class and office hours, I was not surprised that he wrote the best examination paper in the class, the only one receiving a grade of A+, which I reserve for work that is superior not only on a comparative basis, but also standing alone. Seth’s performance in my class was no outlier. He won the Dean’s Prize for the highest grades in the First Year. A person of genuine intellectual curiosity, he has excelled throughout the curriculum.

As a result of his stellar work in my course, I asked Seth to serve as my research assistant last summer. I have been collaborating with Sean Farhang of Berkeley for a decade on quantitative and qualitative research that interrogates what we call the counterrevolution against federal litigation. One facet of that research has focused on class actions. Realizing that our data on Supreme Court class action decisions could not ground reliable inferences, if only because there are so few of them, we undertook a project to study class certification decisions in the U.S. Courts of Appeals, compiling a comprehensive dataset of decisions from 1967 through 2019. Preliminary analysis of these data suggested that some conventional wisdom about the tenor of class certification jurisprudence is, if not wrong, then misleading, perhaps because it is based on a small number of Supreme Court decisions. Seeking to situate our analysis of such a disconnect in a larger theoretical context, I asked Seth to conduct a review of the legal and political science literatures that treat the relationship between the Supreme Court and the Courts of Appeals, with special attention to the question of which level is leading and which following.

This was a very ambitious and difficult assignment, if only because it comprehended scholarship in multiple disciplines that deploys multiple research methods. Seth did a superb job, producing a paper of more than seventy pages that cogently surveys the landscape and identifies the primary theoretical approaches and conclusions of the work considered. It was immensely helpful to us in thinking about our empirical results.

I spent a great deal of last summer trying to learn how to teach virtually. After forty-five years of in-person teaching, this was not easy. Early on I decided that I would need a Teaching Assistant who both knew the material I would be teaching and was comfortable with the technology. I turned to Seth, who agreed to serve in that role. He did so with distinction, attending all of the classes, preparing quizzes, and even holding his own office hours.

Seth is drawn to litigation, and he is thoughtful about the special value of clerking for someone with his interests. He will be a superior law clerk. He is very smart, works hard, and writes well. He is respected by peers and faculty alike for his collegiality and would be a valuable and valued member of your chambers team. I recommend him with great enthusiasm and without reservation.

Sincerely,

Stephen B. Burbank
David Berger Professor
for the Administration of Justice

Stephen Burbank - sburbank@law.upenn.edu - (215) 898-7072

Tel.: (215) 898-7072
E-mail: sburbank@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

May 31, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Re: Clerkship Applicant Seth Rosenberg

Dear Judge Underhill:

I understand that Seth Rosenberg is applying for a clerkship in your chambers. Seth, a member of our Law Review, is among the most intellectually engaged students in his class and seeks out opportunities for research and writing. I recommend him with great enthusiasm.

Seth was an outstanding class participant in my spring 2021 Federal Courts class. I used a panel system in that class in order to ensure that I called on each student multiple times during the semester. Seth served on panel during class days when we discussed federal habeas corpus and state sovereign immunity (respectively). Both times, Seth was well-prepared and his comments were uniformly insightful and on-target. He also regularly volunteered thoughtful comments and perceptive questions throughout the semester. (For example, when we were discussing the fact that a federal habeas court has discretion to raise a statute-of-limitations issue when the warden fails to raise that defense, it was Seth who thought to ask whether a court of appeals also possesses that discretion (I had not assigned any reading on Wood v. Milyard, 566 U.S. 463 (2012)).) Whether he was aptly addressing a hypothetical fact pattern or astutely critiquing the structure of Chief Justice Rehnquist's opinion in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the comments that Seth volunteered enriched our class discussions. Seth's very strong answers on the final exam placed his grade comfortably in the A-minus range. He did a particularly nice job with an essay question that asked exam-takers to assess how the operation of various doctrines that we had studied in the course would be affected by a plaintiff's decision to seek injunctive, rather than damages, relief.

Seth earned his B.A. summa cum laude in Philosophy, Politics, and Law. This interdisciplinary major – with its coursework in philosophy, history, and political science – appealed to Seth because it provided a broad liberal-arts course of study and a lot of opportunities for writing. Mid-way through his undergraduate studies, Seth interned with a trial judge in the New York State criminal court and solidified his interest in studying law. (He took a gap year between college and law school, during which he worked as a paralegal at Williams & Connolly and as an instructor for an LSAT preparation company.) Seth entered Penn Law with a strong continuing interest in studying political science, and this led him to enroll, as well, in the Masters of Public Administration program at Penn's Fels Institute of Government. As you can see from the Fels school coursework on Seth's 2L transcript, he completed four of the required courses for the MPA degree; but over time Seth came to realize that his interests lie more at the law school, and thus he has left the MPA program and expects to weight his coursework more heavily toward law school courses in his 3L year.

Meanwhile, Seth has found time to work as a research assistant for two of my colleagues and as a teaching assistant for my colleague Steve Burbank's 1L Civil Procedure class. He joined both the Law Review and the Asian Law Review. As a board member of the Jewish Law Students Association, Seth organized two events (one featuring a speaker who compared methods of reading texts in Jewish law and American constitutional law, and the other featuring speakers who compared the relationship between church and state in Israel and the United States). As a founding board member of the Disabled and Allied Law Students Association, Seth helped to draft a letter to the faculty urging the use of automated closed captioning in Zoom. I was very grateful for this well-informed and persuasive letter, which alerted me to a feature that I hadn't focused on before, and I adopted its suggestion (and have since made similar suggestions to other groups, such as the ALI, for their online events).

In sum, Seth is a top-notch student with a lively intellect who will be an excellent clerk, and I expect he will get along well with everyone in chambers. Please do not hesitate to let me know if there is any other information that would be useful to you.

Sincerely,

Catherine T. Struve
David E. Kaufman & Leopold C. Glass
Professor of Law
(215) 898-7068
cstruve@law.upenn.edu

SETH ROSENBERG

4200 Ludlow Street, Philadelphia, PA 19104 | (646) 932-7391 | sethros@pennlaw.upenn.edu

WRITING SAMPLE

The attached writing sample is a ten-page excerpt of a memorandum that I drafted as a research assistant for Stephen Burbank, the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School. I performed all the research, and this work is entirely my own.

Memorandum

To: Stephen B. Burbank

From**:** Seth Rosenberg

Date: July 27, 2020

Re: Literature Review

I. Focus of Memo

This memo identifies and discusses scholarship concerning the mechanisms of legal change when comparing the U.S. Supreme Court and the Federal Courts of Appeal. One partial aim of the research conducted for this memo is to assess who the true first movers are when it comes to legal change, or, in other words, which part of the judicial hierarchy is doing the leading, and which part is doing the following. It has been said that the Supreme Court is never too far ahead of public opinion.[1] Instead of addressing questions related to the Supreme Court's responsiveness to the broader populace, this memo addresses slightly different questions: Is the Supreme Court ever too far ahead of the lower courts? Or, alternatively, are the lower courts ever too far ahead of the Supreme Court?

II. Sources of Legal Change

a. The Scholarly Landscape – A Summary

I found some articles that directly focused on legal change,[2] and others that discussed the issue through a particular level of the judiciary.[3] Most articles that discussed legal change primarily focused on the Supreme Court.[4] I was, however, able to find articles that placed an

[1] *See, e.g.*, DEBORAH L. RHODE, LAWYERS AS LEADERS (2013).

[2] *See e.g.*, Hugh Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 U.C.L.A. Rev. 343, 345 (1998) ("One way to understand the role of the Supreme Court of the United States is to see it as a manager of legal change."); Douglas Rice, *The Impact of Supreme Court Activity on the Judicial Agenda*, 48 LAW & SOC'Y REV. 63 (2014) ("I find evidence in both trial and appellate courts that Supreme Court attention to policy areas subsequently leads to *fewer* cases being heard and decided in those policy areas in the lower courts. Yet I also find evidence of additional interest group attention, and additional published opinions, in lower federal courts in issue areas after the Supreme Court addresses that issue.").

[3] *See, e.g.*, Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PA. L. REV. 595, 596 (2017) ("In this Article, we consider the more basic question of lower court adherence to precedent. We address this principally by analyzing U.S. district court judges' treatment of precedents from the Supreme Court and courts of appeals across an eighty-year span.")

[4] *See, e.g.*, Bethany J. Ring, Comment, *Ripples in the Pond: United States Supreme Court Decision Impact Predictions v. Reality*, 23 CHAP. L. REV. 205 (forthcoming Winter 2020). Other authors focused on the Supreme Court but did not ignore the limits the Court faces in changing the law. *See* Baxter, *supra* note 2, at 345 ("Given the

emphasis on the lower courts.[5] Not all authors were confident in their analysis of legal change,[6] which suggests further study in this area is warranted. One article had shades of normativism,[7] and seemed to argue that regardless of whether the lower courts *do* affect legal change, it is their role to do so and, therefore, they *should* affect legal change.[8]

b. The Importance of the Lower Courts in Studying Legal Change

Even if the data demonstrates that the Supreme Court affects legal change, the lower courts will still be doing most of the legwork. So, studies of the Supreme Court's ability to change the law are incomplete without accounting for how the lower courts respond to the Court's actions.[9] It is important to gauge the extent that the Court affects the agenda of the lower courts, because if such an influence is found, then "the Court shapes both policy and lower court opportunities for compliance with the Court's preferences on that policy."[10] A more subtle way the Court can affect the issues dealt with by the lower courts is through the effects the Court has on litigants. When the Court speaks, others listen, and adapt.[11] The types of litigants primarily interested in individual success might be replaced by others primarily interested in moving public policy.[12] The Court's actions alter "the attention the federal courts devote to [an issue] and thus the influence the judiciary has on that issue, in subsequent years."[13]

Court's scarce resources and limited opportunities for review, other courts can blunt or delay the Supreme Court's law-reform projects with their own strategies of evasion or circumvention.").

[5] For example, one article assessed the role, over time, that the lower courts have played in the development of the law and concluded that "today's district court judges play a far less active role in shaping the law than their predecessors did." Devins & Klein, *supra* note 3, at 597.

[6] One author found mixed evidence of Supreme Court influence. *See* Rice, *supra* note 2, at 64 (finding that, in some policy areas, once the Supreme Court addressed an issue it led to "fewer cases being heard and decided in those policy areas in the lower courts," but also finding "evidence of . . . additional interest group attention, and additional published opinions, in lower federal courts in issue areas after the Supreme Court addresses that issue").

[7] For a more detailed description of normative arguments, see Adam J. Kobler, *How to Fix Legal Scholarmush*, 95 IND. L.J. 1191, 1196 ("Descriptive claims address the way the world is, was, or will be. . . . Normative claims, by contrast, speak to how the world ought to be.").

[8] *See* Devins & Klein, *supra* note 3, at 599 ("[T]he doctrine of dicta compels the judge deciding a case to make her "own decision.").

[9] Ring, *supra* note 4, at 208 ("[T]o understand the true impacts of a singular Supreme Court ruling, a conscious research effort evaluating the lower courts' implementation is required . . . [otherwise,] unsubstantiated conjectures in the literature may come to be accepted as valid truisms, thus undermining [the literature] . . . .").

[10] Rice, *supra* note 2, at 63.

[11] *Id.* at 64. ("The Court's attention shifts the very participation of certain actors seeking to influence public policy in the federal courts, as issue areas go from being characterized by broad-based litigation to being characterized by less litigation, but more sophisticated participants.")

[12] *Id.*

[13] *Id.* at 65.

c. The Mechanisms of Legal Change

Just as authors utilizing a complexity approach spoke in terms of an equilibrium,[14] some authors did the same when adopting a framework to evaluate legal change.[15] The displacement of entrenched aspects of legal regimes creates an influx of complexity, and, as discomfort with newly ambiguous areas of the law permeates throughout the legal system, it sets "off a search for more determinate rules."[16] One way to study the mad dash that follows changes to prior understandings of law, is to focus on the questions that surround the fate of past cases decided under now-changed legal frameworks.[17] "Transitional moments"[18] in the law are not created equally: the more a change in the law implicates a "potential to unsettle the outcome of an enormous number of already decided cases,"[19] the more difficult the transitional period will be.

However, not every change in the law is necessarily destabilizing.[20] The degree of impact a legal change will have on the overall system is dependent on the context of the attempted change and whether these changes apply retroactively or prospectively. For example, grandfathering provisions, which provide that activities "initiated under an old rule will continue to be governed by that rule," are an example of some of the tools that can be "used to limit the impact of a legal change."[21] Other than the latter tools, external actors affected by legal change can make

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[14] *See, e.g.,* Doni Gewirtzman, *Lower Court Constitutionalism,* 61 AM. U.L. REV. 457, 499, 503 n. 243 (2012) ("Systems theorists often measure a system's performance by looking at the systems' resilience and adaptive capacity: its ability to survive, adjust, and thrive in a changing environment."); J.B. Ruhl, *General Design Principles for Resilience and Adaptive Capacity in Legal Systems - With Applications to Climate Change Adaptation*, 89 N.C. L. REV. 1373, 1388 (2011) (defining the adaptive capacity of legal systems as "the system's ability to respond to "threats to system equilibrium … by changing resilience strategies without changing fundamental attributes of the system").

[15] *See, e.g.,* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997) ("Equilibrium theory provides a framework for evaluating legal change as a function of the legal context into which that change is introduced."); Hathaway, *supra* note 27, at 606, 609 (arguing that "[t]he doctrine of stare decisis . . creates an explicitly path-dependent process," and that when assessed as an "increasing returns" path dependent process, we should expect the law to produce "multiple [possible] equilibria"); Kastellec, *The Judicial Hierarchy: A Review Essay, supra* note 5, at 10 ("In equilibrium, the Supreme Court is most likely to review cases from the side of the conflict it eventually rules against, because these cases are most informative.").

[16] *Id.* at 740.

[17] Toby J. Heytens, *The Framework of Legal Change*, 97 CORNELL L. REV. 595, 595-96 (2012) ("[T]he same basic question arises again and again: What should we do about all those other cases that courts have already resolved using legal principles that were subsequently tweaked, overhauled, or rejected? In a previous article, I called situations raising that question 'transitional moments.'").

[18] *Id.*

[19] *Id.*

[20] Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1058 (1997) ("Adoption of a new legal rule can, but need not, constitute a destabilizing influence on the underlying legal structure. Equilibrium theory thus provides a tool for judging stability within the legal system.").

[21] *Id.* at 1067.

impactful change more difficult, if only because it can be hard to fully predict how such actors will respond to legal change. For example, as social workers become more involved with divorce proceedings, the role of social workers and the tenor of divorce proceedings have changed concurrently.[22] A separate but related issue is the possibility that external actors fail to respond to legal change at all. The potential for the law to affect societal change has it limits.[23] And while the source cited in the latter footnote focused on the economy, and not the judiciary, it at least appears intuitively correct that the Supreme Court's attempts at legal change would butt heads with deep-rooted norms in the lower courts in ways that would lessen the Court's overall impact.

Legal change is most likely to occur where the law is indeterminate. This is because judges are unlikely to change the law where it is settled and clear, or at least this is the expectation. Confusion in the law is where legal scholars can assist lower courts left without guidance,[24] but unfortunately, "[s]cholars currently lack a concrete theory of how courts should proceed in such situations."[25] Worse still, the solutions offered to the Supreme Court's unstable approach to statutory interpretation seem to imply that any consistent approach is better than no consistency at all, that uniformity and simplicity are *per se* virtues for the Court when they make changes to the law.[26] In deciding how to change the law, and when, the Court must "negotiate the trade-off between the institutional and epistemic benefits of formal law and the costs of applying flawed tests."[27]

To fully flesh out the above discussion of legal indeterminacy, it is necessary to see how and why such gaps in the law develop. The Court's decision to change the law, and the extent that

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[22] Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 743-744 (1988) ("As the formal role of social workers evolved, so did their ideology and rhetoric. Consistent throughout the evolution of social workers' involvement with divorce, however, has been their perception that their appropriate function is to make divorce as conflict-free as possible, or at least to manage the conflict appropriately.")

[23] Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-stakeholder Divide*, 36 IOWA J. CORP. L. 59, 111 (2010) ("[T]here is reason to doubt that legal change alone will lead to structural or institutional change in the actors and relationships that are entrenched in the economy.").

[24] Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 594 (2018) (arguing that the way the Courts have dealt with the scope of the Fourth Amendment is one example of what the author terms a "legal blank slate," because "formal law is essentially silent on the issue, yet judges are compelled to set some standards to guide future courts and other legal actors, [and thus,] [c]ourts seeking to move beyond the confusion of current Fourth Amendment law are left with a blank slate.").

[25] *Id.* at 591.

[26] *Id.* at 211-12 ("The explicit premise of much of this work is that 'often it is not as important to choose the best convention as it is to choose one convention and stick to it.' I refer to this trend toward simplification and uniformity as "the dumbing down of statutory interpretation.") (footnote omitted).

[27] Tokson, *Blank Slates*, *supra* note 196, at 596.

they can succeed in this effort, is a pendulum that swings from hyperactivity to complete silence. This dynamic occurs over the course of decades, and, despite the fact that this often leaves the lower courts without guidance for long stretches at a time, the lower courts are still tasked with developing the law in these areas.[28] Sometimes the confusions produced by Supreme Court decisions are accidental, but that does not mean the Court is quick to correct the unintended consequences of its decisions.[29] However, it is hard to believe the Court is entirely innocent when changes in the law develop after a decision is issued.[30]

One manifestation of the Court's varying level of activity in addressing gaps in the law are intercircuit splits. The resolution of intercircuit splits is "responsible for the lion's share of legal development in federal courts."[31] Although splits create difficulties for the judicial system, the resource constraints imposed on the Court make splits somewhat unavoidable. This is because "the Supreme Court depends crucially on litigation in lower courts to yield information about the relationship between legal rules and outcomes in the real world."[32] In other words, one can think of legal changes as hypotheses put forth by the Supreme Court and the responses of the lower courts as the data necessary to assess those hypotheses. The Court benefits from leaving an area of the law untouched for long stretches of time because allowing the lower courts to develop the

[28] *See, e.g.*, Peter J. Hammer, *Questioning Traditional Antitrust Presumptions: Price and Non-price Competition in Hospital Markets*, 32 U. MICH. J.L. REFORM 727, 741 (1999) ("While the Supreme Court has taken a noticeable hiatus from section 7 jurisprudence, the lower courts and the enforcement agencies have continued to refine the process of merger analysis."); Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *A New State Registration Act: Legislating a Longer Arm for Personal Jurisdiction*, 57 HARV. J. ON LEGIS. 377, 384 (2020) ("During the Court's jurisdictional *hiatus*, the *lower courts* developed and applied a framework for adjudicative authority constructed, to the extent possible, from the *Supreme Court*'s binding pronouncements. This undertaking was not [easy,] predominantly due to the Supreme Court's avoidance of--or inability to resolve--several foundational jurisdictional issues.")

[29] Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L. J. 419, 435 ("[The] *Marks* 'narrowest ground' doctrine has failed to accurately predict the outcome of future Supreme Court decisions. This failure can lead to discontinuity and uncertainty regarding important legal principles because of the break between prior interpretations of Supreme Court decisions by lower federal courts and the Supreme Court's later, conflicting resolution."). One author succinctly described the mechanism for how accidental legal change occurs. *See* Hasen, *supra* note 25, at 792 ("Inadvertence occurs when the Court changes the law without consciously attempting to do so, through attempts to restate existing law in line with the writing Justice's values.").

[30] One author, discussing various ways Supreme Court Justices move the law, was less equivocal. *See* Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779, 781-82 (2012) ("[P]erhaps the most common reason that a Justice will vote to hear a case will be to make some change in existing law.")

[31] Beim & Rader, *supra* note 25, at 450.

[32] Clark & Kastellec, *supra* note 8, at 152.

law gives the Supreme Court a far more extensive record of the effects of attempted changes to the law. Additionally, more eyes should infuse more creativity into the law.

The resolution of intercircuit splits—and by extension the decision to change the law—is a tradeoff. The Court must choose between the costs associated with leaving splits unresolved[33] on the one hand, and the informational benefits received from "allowing other lower courts to make their own independent judgments,"[34] on the other. When the Court resolves a split, "[i]t chooses to forego the additional information it might glean from allowing the legal question to further play out in the lower courts."[35] At the same time, however, resolution of intercircuit splits "swiftly eliminates the lack of uniformity in the law created by the conflict, by settling the issue."[36] Multiple models of the Court's behavior with regard to circuit splits indicate that "the Court should be more likely to end a conflict immediately . . . when a conflict emerges after several lower courts have already weighed in on a new legal issue."[37]

Although when resolving intercircuit splits, and by extension affecting legal change, the Court tends "to join the [position taken by a] majority of circuits,"[38] sometimes the Court disregards widespread views in the lower courts.[39] Thinking of the judicial process as a dialectic might help explain why the latter occurs.[40] If we view interactions between the Supreme Court

[33] *Id.* (discussing how *United States v. Booker*, 543 U.S. 220 (2005), "which ruled that federal district court judges were to treat the U.S. sentencing guidelines as advisory rather than mandatory," caused an intercircuit split, which effectively meant that "defendants with similar cases faced different standards of appellate review of their sentences, depending on where they committed their crimes").
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Kastellec, *The Judicial Hierarchy: A Review Essay*, *supra* note 5, at 10. *See also* Beim & Rader, *supra* note 25, at 449 ("'Well-percolated' splits . . . are no more likely to be resolved by the Supreme Court. The likelihood of resolution does not increase as more cases arise in a split.")
[38] Clark & Kastellec, *supra* note 8, at 152. *See also* Kastellec, *The Judicial Hierarchy: A Review Essay*, *supra* note 5, at 9 ("[W]hen the justices review circuit conflicts, they are more likely to come down on the side of the issue that was favored by a majority of the circuits, suggesting that the justices are engaging in vertical learning.").
[39] *See, e.g.*, Heytens, *The Framework of Legal Change*, *supra* note 188, at 597 ("Until 2009, the widespread view in the lower courts was that a police officer who had lawfully arrested [drivers,] could, without need for any further justification, search the entire passenger compartment of the vehicle. In *Arizona v. Gant*, [556 U.S. 332 (2009),] however, the Supreme Court rejected that position . . . ."). The same author went on to point out that *Gant* is not the first time "the Supreme Court changed the law in a way that threatened to call into question a great many previous convictions and sentences. The Warren-era Court, of course, did that sort of thing all the time. But the Rehnquist-era Court did it quite a few times too . . . ." *Id.* 603.
[40] *See, e.g.* Siegel, *supra* note 18, at 1187 ("The dialectical, side-by-side model of judicial interactions developed in this Article is distinct from approaches that emphasize either top-down hierarchy or bottom-up resistance or percolation.").

and the lower courts as a conversation, then this phenomenon makes more sense. Under this view, the federal courts are "a system in which lines of communication and influence can run back and forth, not just down."[41] When the Court speaks, it has the final say in this conversation, but the lower courts still retain a powerful voice. So, it makes sense that, as in any conversation between a superior and a subordinate with valued opinions, the Court, in resolving splits, sometimes listens to the majority of circuits, and other times appears to flout them.

The dynamic between the Court and the lower courts is better described as an informational dialectic, as the Court and the lower courts are not truly "talking." This dialectic begins when the Court establishes precedent with "a degree of uncertainty regarding how these precedents will actually play out . "[42] Then, as the lower courts implement that precedent, the ideological nature of that implementation, provides "information to [the Supreme Court] about the implications of the precedent as it is applied to contemporary disputes."[43] Lastly, the Court then uses "this information to correct its body of precedent."[44] Where the Court has not put forth firm precedent, such as with a plurality decision, the lower courts have a greater role in this dialectic.[45] One major caveat to this discussion is that while reasoning from lower court opinions should benefit the Supreme Court, "it is unclear whether that reasoning actually reaches the Supreme Court."[46]

While the above discussion of the mechanisms of legal change is important, it is equally valuable to assess the multiple options available to the Court when it seeks to change the law. One author argued that the problem with past scholarship on how the Supreme Court affects the lower courts is that it focuses on the "decision-making stage, but [ignores] the prior step in which cases actually arrive in lower courts."[47] The same author went on to argue that understanding whether the Supreme Court can and does manipulate "what is on the agenda of the lower federal courts . . . is crucial to understanding the decision-making process."[48] These comments suggest

[41] Siegel, *supra* note 18, at 1223-24.
[42] Hansford et al., *supra* note 7, at 894.
[43] *Id.* at 895.
[44] *Id.*
[45] *See* Marceau, *supra* note 148, at 975-76 ("Under the limited class of cases in which the Court applies Marks there is often substantial deference shown to lower court agreement as to the precedent flowing from a prior plurality.")
[46] Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction,* 74 OHIO ST. L.J. 423, 439 (2013).
[47] Rice, *supra* note 172, at 65.
[48] *Id.*

that there is still much to learn regarding the Supreme Court's ability to change the law.[49] However, there were some authors who at least catalogued the potential methods the Court can use to change the law. Some approaches to changing the law are direct: the Court can expressly try to change the law by overruling or extending precedent;[50] or alternatively, the Court can invite "litigants to argue for the overruling or extension of precedent."[51] Other methods are less direct, such as anticipatory overruling, where the Court signals that while precedent is safe for the moment, it may not fare much better in the future.[52] In the past anticipatory overruling were more overt, but recently "the Court has backed off such express anticipatory overrulings."[53] Related to the practice of anticipatory overruling is "stealth overruling,"[54] in which the Court functionally, but not explicitly, overrules an existing precedent. One way this can happen is through overly complex qualifications on the precedential value of an opinion or legal rule.[55] Still other methods of changing the law are hiding in plain sight: what one author described as "time bombs,"[56] or "seemingly offhand, throwaway phrases that [are then] exploited in later cases."[57]

Regardless of the Court's actual impact on the state of the law, there are built-in limits to the Court's influence. The Court constrains itself through both formal and informal "rules and norms

[49] *Id.* ("[W]e do not know whether and how the Supreme Court influences what lower federal courts discuss and decide. Yet history suggests influence does exist.").
[50] Hasen, *supra* note 25, at 782.
[51] *Id.* at 784.
[52] *Id.* at 783 (describing the Court's decision in Northwest Austin Municipal Utility District Number One v. Holder, 129 S. Ct. 2504 (2009), as "signaling that [the Court] would not be so charitable when reviewing the [constitutionality of section five of the Voting Rights Act] in the next case").
[53] *Id.* at 784. One author quoted Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982), as an example of past anticipatory overrulings. This example serves as a useful reference point for how the Court has transitioned in its use of this tactic. *See id.* ("[T]he Court held that the Bankruptcy Act of 1978 was unconstitutional . . . [but] stayed its own ruling to give Congress 'an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of bankruptcy laws.'").
[54] Hasen, *supra* note 25, at 780 ("The Roberts Court also has engaged in 'stealth overruling.' Stealth overruling occurs when the Court does not explicitly overrule an existing precedent. Instead, it 'fails to extend a precedent to the conclusion mandated by its rationale,' or it 'reduces a precedent to nothing.'").
[55] *See, e.g.*, Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1535 (2008) (quoting an example of disingenuous judicial behavior, provided by legal scholar Karl Llewellyn, whereby a court distinguishes "a prior decision by declaring 'this rule holds only of redheaded Walpoles in pale magenta Buick cars.'") (footnote omitted).
[56] *Id.* at 789. (giving credit for the term to SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION).
[57] *Id.* (quoting SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION).

that govern the Court's own decision-making processes,"[58] and is additionally constrained by forces, such as losing litigants who do not seek appeal, that work to diminish "the occasions upon which the Court will have an opportunity to issue law-changing decisions."[59] Of particular relevance, when the Court attempts to move the law, it must account for the viability of faithful implementation in the lower courts.[60] Stare decisis is likely the most well-known limitation imposed on the Court. Because stare decisis is based "on the need for consistency, efficiency, [and] predictability,"[61] it acts as a judicial levee preventing a constant flood of legal change. Even though stare decisis can be circumvented by creatively distinguishing or reconciling precedent, such "creativity must be bounded by intellectual candor."[62] One author seemed to imply that the degree of faithfulness to stare decisis is a function of the Court's appetite for legal change.[63] Luckily, however, the Justices are not entirely free to change the law on a whim, as there are costs to legal change.[64]

The general requirement of reason-giving inherent to opinion writing is arguably heightened when considering attempted changes to the law. [65] While the latter is supposed to limit those Supreme Court Justices that are hungry for legal change, one author expressed concern that this intuitively heightened reason-giving requirement has been abandoned in an "insidious manner."[66] For example, in *Gonzales v. Carhart*,[67] "the Court upheld the constitutionality of a federal law prohibiting so-called 'partial birth abortions,' even though the Court had held a virtually identical state law unconstitutional seven years earlier . . . [but] offered no principled

[58] Baxter, *supra* note 119, at 346.
[59] *Id.* at 345.
[60] *See* Tokson, *Judicial Resistance and Legal Change*, *supra* note 25, at 967 ("In general, judicial resistance to doctrinal change may present another obstacle to the pursuit of meaningful social change via the courts.").
[61] Stone, *supra* note 229, at 1534.
[62] *Id.*
[63] *Id.* at 346.
[64] *See, e.g. id.* ("[O]verruling has costs for the prevailing majority – perhaps impaired relations with fellow Justices who would have adhered to the precedent, the sting of a dissenting opinion, professional criticism, and sometimes public disapproval.").
[65] *See id.* ("[T]he Court is expected to provide reasoned explanations for its decisions. This expectation increases with a decision to change the law, and particularly with a decision to overrule one of the Court's precedents.") (footnotes omitted). One author normatively argued that even if one posits that there is not a heightened requirement for reason-giving, there ought to be one. *See* Stone, *supra* note 229, at 1534 ("[B]ecause the act of overruling a prior decision is and should be relatively unusual in our legal system, such an act when it occurs should be openly acknowledged, explained, and justified.").
[66] Stone, *supra* note 229, at 1537-38 ("Their technique, which was perfectly anticipated and ridiculed by Karl Llewellyn, is to purport to respect a precedent while in fact cynically interpreting it into oblivion.").
[67] 127 S. Ct. 1610 (2007).

basis for ignoring the earlier decision."[68] The positions offered by Justices in recent situations where the Court has arguably perverted stare decisis are only supportable "if they were writing on a clean slate."[69] However, the Court is *not* writing on a clean slate, and so, when the Court functionally overrules precedent but does not own up to what it is doing, it is being dishonest. Such dishonesty is damaging to judicial integrity and confounding for the study of legal change.[70]

d. Notes for Future Scholarship in this Area of the Law

Supreme Court decisions need time to breathe before an adequate assessment of their impact is possible.[71] Unfortunately, "a majority of academic and popular commentary frequently occurs within a few years of a decision, and by its very nature, such commentary is incapable of assessing any long-term effects."[72] Moreover, because it is in the Court's best interests not to draw attention to itself when acting with the potential for public backlash, scholars are alone sometimes in choosing cases which have already or will in the future produce legal change.[73] So even results that appear to demonstrate either the Court's failure to create legal change or a choice not to must be taken with a grain of salt, as the Court could be "stealth overruling."[74] The sometimes covert nature of legal change leads to misfires: scholars anticipate a certain case in the pipeline will effect momentous legal change, and then no such change occurs.[75] This demonstrates either that changes in the law are generally difficult to predict or that scholars do not yet fully understand how legal change occurs; thus, this is an area ripe for further study.

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[68] Stone, *supra* note 229, at 1538 (footnote omitted).
[69] *Id.*
[70] One author argued that "[t]he sad truth is that Roberts and Alito seem to have been driven by nothing more than their own desire to reach results they personally prefer . . . ." *Id.* Of course, the Court has not always been fully honest in its opinions, and so this is not a new phenomenon. *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO L.J. 1, 4 (2010) ("Stealth overruling is assuredly not unique to the Roberts Court . . . the Warren Court, for example, did it as well . . . .").
[71] Ring, *supra* note 174, at 207 ("Supreme Court decisions such as *Reed* are analogized herein to pebbles cast into a pond. Ofttimes, the mass of the pebble is not fully understood before it is launched; but the ripples it produces can be easily observed and analyzed, given sufficient time.").
[72] *Id.*
[73] Hasen, *supra* note 25, at 780 ("Despite the Citizens United ruling, and maybe now more because of the public reaction to it, express overrulings of precedent are rare.").
[74] *Id.*
[75] *See* Ring, *supra* note 174, at 207 ("Because they operate as the final say, Supreme Court opinions are ofttimes the subject of academic ponderings and predictions in literature. Occasionally, however, these jurisprudential prophecies may fail to materialize.").

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Journal(s)	**Cardozo Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Monrad G. Paulsen Competition, Cardozo Moot Court Honor Society**

Bar Admission

Admission(s) **New York**

Prior Judicial Experience

Judicial Internships/ Externships **Yes**

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May 15, 2023

The Honorable Stefan R. Underhill
United States District Court for the District of Connecticut
Brien McMahon Federal Building and
United States Courthouse
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RE: 2024–2026 Term Clerkship

Dear Judge Underhill:

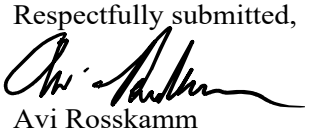
I am a law clerk at the Staff Attorney's Office at the United States Court of Appeals for the Second Circuit, and I am a 2021 graduate of the Benjamin N. Cardozo School of Law in New York, where I ranked in the top 10% of my class and served on the editorial board of the *Cardozo Law Review*. I am writing to apply for a 2024–2026 term clerkship position in your chambers.

As an aspiring litigation attorney and having served as a law clerk at the Second Circuit, in addition to completing three judicial internships during law school, I believe my skills and experience will make me a strong addition to your chambers. At the Second Circuit, I write through and precise bench memoranda on a variety of substantive and procedural legal issues concerning diverse areas of law, including civil rights (42 U.S.C. § 1983), constitutional law, criminal law and procedure, habeas corpus, employment discrimination (Title VII), class action litigation, appellate procedure and jurisdiction, and civil procedure. During my 2L spring semester, I served as an extern in the chambers of the late Hon. Paul G. Feinman, New York Court of Appeals, and during my 1L summer, I interned in the chambers of the Hon. Nicholas G. Garaufis, United States District Court for the Eastern District of New York. Further, my Note, *Exhausting Comity-Based Abstention in the FSIA's Expropriation Exception*, has been published in the *Cardozo Law Review*.

My resume, transcript, and writing samples are submitted with this application. Cardozo will submit letters of recommendation from Catherine J. Minuse, Supervising Staff Attorney, United States Court of Appeals for the Second Circuit, Professor Laura Cunningham, Professor Stewart Sterk, and Professor Richard Weisberg, under separate cover. Further references from Hon. Nicholas G. Garaufis and David Bober, Director of the Staff Attorney's Office, United States Court of Appeals for the Second Circuit, and additional writing samples, are available upon request.

I would be honored to have the opportunity to interview with you and further discuss my qualifications. Thank you for considering my application.

Respectfully submitted,



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BAR STATUS

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Activities: Civil Procedure Teaching Assistant, Professor Suzzanne L. Stone (August 2020 – December 2020); Lawyering and Legal Writing Teaching Assistant, Professor Christopher Serbagi (September 2019 – May 2020); Intensive Transactional Lawyering Program (January 2021).

Publications: Note, *Exhausting Comity-Based Abstention in the FSIA's Expropriation Exception*, 42 CARDOZO L. REV. 1113 (2021).

Comment, *Owner Entitled to Cancellation of Notice of Pendency Upon Posting of Bond*, N.Y. REAL EST. L. REP., Mar. 2021.

Comment, *Judgment Lien Enforced Despite Error in Docketed Amount*, N.Y. REAL EST. L. REP., Apr. 2021.

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Staff Attorney, August 2021 – August 2023

Summer Law Intern for the Staff Attorney's Office, May 2020 – August 2020

Prepare bench memoranda and proposed orders for the judges of the Second Circuit recommending dispositions in appeals and substantive motions concerning diverse areas of law, including civil rights (42 U.S.C. § 1983), constitutional law, criminal law and procedure, habeas corpus, employment discrimination (Title VII), appellate procedure and jurisdiction, and civil procedure.

Shearman & Sterling LLP, New York, NY

Legal Intern, January 2021 – April 2021

Drafted a cross-indemnity agreement, a limited waiver agreement, and an opinion letter for real estate-related transactions. Created lease abstracts, closing checklists, and key dates and deadlines summaries for real estate deals. Marked up a construction contract. Edited and updated Chapter 24 of Commercial Contracts: Strategies for Drafting and Negotiating, which covers commercial leases. Created CLE materials for a presentation on FinCEN, the Corporate Transparency Act, and Geographic Targeting Orders.

New York Court of Appeals, New York, NY

Judicial Extern for the Hon. Paul G. Feinman, January 2020 – April 2020

Conducted legal research and analysis, and drafted, edited, and proofread bench memoranda for pending appeals, criminal leave applications, and civil motions for leave to appeal, including an appeal relating to whether New York State should adopt cross-jurisdictional tolling in class action litigation.

United States District Court for the Eastern District of New York, Brooklyn, NY

Judicial Intern for the Hon. Nicholas G. Garaufis, May 2019 – August 2019

Conducted legal research and analysis, and drafted, edited, and proofread bench memoranda, including a habeas corpus petition, challenging 18 U.S.C. § 924(c)'s "residual clause" as unconstitutionally vague, and a Rule 12(b)(6) motion in a breach of contract lawsuit. Observed courtroom proceedings, including a seven-week high-profile criminal trial.

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INSTITUTION CREDIT:					
Summer 2018					
JD Cardozo School of Law					
Law					
New First Time					
LAW	6003	Contracts Goodrich, Peter	5.000	A-	
LAW	6101	Criminal Law Roth, Jessica	3.000	B	
LAW	6202	Elements of the Law Newman, Leslie	2.000	B	
Ehrs: 10.000 QPts: 33.335					
GPA-Hrs: 10.000 GPA: 3.333					
Fall 2018					
JD Cardozo School of Law					
Law					
Continuing					
LAW	6300	Civil Procedure Yablon, Charles	5.000	B+	
LAW	6703	Torts Buccafusco, Chris	4.000	B+	
LAW	6790	Lawyering & Legal Writing I Fabrizio, Ralph	1.000	B+	
Ehrs: 10.000 QPts: 33.330					
GPA-Hrs: 10.000 GPA: 3.333					
Spring 2019					
JD Cardozo School of Law					
Law					
Continuing					
LAW	6403	Property Sheff, Jeremy	5.000	A	
LAW	6501	Constitutional Law I Rudenstine, David	3.000	B+	
LAW	6791	Lawyering & Legal Writing II Fabrizio, Ralph	2.000	B+	
Ehrs: 10.000 QPts: 36.665					
GPA-Hrs: 10.000 GPA: 3.666					

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	R
Institution Information continued:					
Fall 2019					
JD Cardozo School of Law					
Law					
Continuing					
LAW	7419	Business Immigration Law Wildes, Michael	2.000	B+	
LAW	7441	Trusts & Estates Zelinsky, Edward	3.000	A-	
LAW	7601	Federal Income Tax I Cunningham, Laura	4.000	A	
LAW	7914	Legal Writ Research Newman, Leslie	1.000	P	
LAW	7939	Law Review Shaw, Kate	0.000	P	
LAW	7953	Paulsen Competition Lipshie, Burton	1.000	P	
LAW	7992	E-Discovery Gabriel, Manfred	2.000	A+	
Ehrs: 13.000 QPts: 42.333					
GPA-Hrs: 11.000 GPA: 3.848					
Winter 2020					
JD Cardozo School of Law					
Law					
Continuing					
LAW	7309	Negotiation Theory & Skills Tsur, Michael	2.000	B+	
Ehrs: 2.000 QPts: 6.666					
GPA-Hrs: 2.000 GPA: 3.333					
Spring 2020					
JD Cardozo School of Law					
Law					
Continuing					
LAW	7060	Corporations Weinstein, Samuel	4.000	P	
LAW	7301	Federal Courts Reinert, Alex	3.000	P	
LAW	7753	Prof. Responsibility Sebok, Anthony	3.000	P	
LAW	7914	Legal Writ Research Newman, Leslie	1.000	P	
LAW	7939	Law Review Shaw, Kate	1.000	P	
LAW	7996	Public Sector Externship Sem Webb, Lauren	1.000	P	
LAW	7998	Public Sector Ext Field Plcmt Smith, Roberta	2.000	P	
Ehrs: 15.000 QPts: 0.000					
GPA-Hrs: 0.000 GPA: 0.000					

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Continuing				
LAW 7790	Advanced Legal Research Smith, Olivia	1.000	P	
Ehrs: 1.000	QPts: 0.000			
GPA-Hrs: 0.000	GPA: 0.000			
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JD Cardozo School of Law				
Law				
Continuing				
LAW 7360	Introduction to Trial Advocacy Horn, Moshe	2.000	B+	
LAW 7424	Contract Drafting Madsen, Bertrand	3.000	A-	
LAW 7502	Constitutional Law II Pearlstein, Debor	4.000	A	
LAW 7611	Corporate Tax Zelinsky, Edward	3.000	A	
LAW 7900	Teaching Assistant Stone, Suzanne	1.000	P	
LAW 7940	Law Review Editorial Bd Shaw, Kate	1.000	P	
Ehrs: 14.000	QPts: 45.667			
GPA-Hrs: 12.000	GPA: 3.805			
Winter 2021				
JD Cardozo School of Law				
Law				
Continuing				
LAW 7374	Int Transactional Lawyer Prog Greenberg-Kobrin,	3.000	P	
Ehrs: 3.000	QPts: 0.000			
GPA-Hrs: 0.000	GPA: 0.000			
Spring 2021				
JD Cardozo School of Law				
Law				
Continuing				
LAW 7330	Evidence Stein, Edward	4.000	A+	
LAW 7609	Partnership Tax Cunningham, Laura	3.000	A	
LAW 7940	Law Review Editorial Bd Gilles, Myriam	1.000	P	
LAW 7958	Real Estate Reporter Sterk, Stewart	2.000	A	
Ehrs: 10.000	QPts: 37.332			
GPA-Hrs: 9.000	GPA: 4.148			

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Module 2B F (October - December 2012)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Principles of Management	Dennis J Sciarrino	A	3	
Macroeconomics	Stephen Harding	A	3	

Module 3 F (January - March 2013)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Managerial Communications		A	3	
Principles of Marketing	Art Mollengarden and Jennifer Williams	A-	3	
Microeconomics	Stephen Harding	A	3	

Module 4B F (March - April 2013)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Organizational Theory and Development	Phillip Murphy	A	3	
Business Law I	Dennis McLaughlin	A	3	
Business & Society	Phillip Murphy	A	3	

Module 1 (August - October 2013)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Human Resource Management	Susan Pellerin	A	3	
Statistics I	John Paul	A	3	

Module 2B (October - December 2014)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Financial Accounting		A	3	

Module 3 (January - February 2015)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Managerial Accounting		A	3	
Principles of International Business	Alexia Priest	A	3	

Module 4B (March - April 2015)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Principles of Finance	Carol Gooden	A	3	

Work Life and Career Development	Annette McLaughlin	A	3	

Module 5 (April - June 2015)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Policy Seminar	Charles Fenner	A	3	
Labor Management Relations	C. Martin Medford, III	A	3	

Module 6 (June - August 2015)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Seminar in Human Resource Management	Susan Pellerin	A	3	
Business Law II	Leonard A. McDermott	A	3	

Module 1 (August - October 2015)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Computing		A	3	

Module 2B (October - December 2015)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Exploring Environmental Issues	Hollie Rakowski	A	3	
College Writing	Carlin Carr	A	3	

Module 3 (January - March 2016)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
College Algebra		A	3	

Module 4B (March - May 2016)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Finite Analysis		A	3	
College Writing II	Debra Cahill	A	3	

Transfer Term

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Hebrew Language II		LE	3	
Liturgy as Literature: Jewish		LE	3	
Introduction to Philosophy		LE	3	
Devise and Disposition		LE	3	
Hellenism from a Rabbinic Perspective		LE	3	

Hebrew Language I	LE	3
Public Speaking	LE	3
Organized Structure of Orthodox Judaism	LE	3
The Luach: Conceptions of Cycle	LE	3
Hebrew Language Translation	LE	3
Exodus: Forging of the Jewish	LE	3
Haftara: Selected Writings of	LE	3
Ethical Works of Luzzato	LE	3
Five Scrolls: Drama, Narrative	LE	3
Jewish Life Events	LE	3

CARDOZO
BENJAMIN N. CARDOZO SCHOOL OF LAW - YESHIVA UNIVERSITY
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Richard H. Weisberg
Walter Floersheimer Professor of Constitutional Law
646-592-6471
EMAIL rhweisbg@yu.edu

May 15, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Re: Avi Rosskamm

Dear Judge Underhill:

I heartily endorse Avrohom Rosskamm as a candidate for a clerkship in your chambers. A talented writer, whose work on Holocaust restitution has just been published in the CARDOZO LAW REVIEW, Mr. Rosskamm has demonstrated to me over the several years I have advised him on that note a fine ability to attack difficult legal issues. He writes quite well, and in several conferences he has attended on Holocaust restitution and the Foreign Sovereign Immunities Act he has also participated (via the Zoom Q & sessions) in oral communication and debate to great effect.

I am sure that he will bring all these noteworthy skills to the environment of your chambers, easing your travails while also occasionally challenging you to re-consider certain positions.

I would be delighted to discuss his candidacy more with you at the phone number below.

With best wishes,

Richard Weisberg
Floersheimer Prof. of Constitutional Law
and Distinguished Visiting Prof., U of Pittsburgh Law School
(646) 812-4159

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Stewart E. Sterk
H. Bert and Ruth Mack
Professor of Real Estate Law
646-592-6464
E-MAIL sterk@yu.edu

May 15, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

I write on behalf of Avi Rosskamm, a former student of mine, who is seeking a clerkship in your chambers. Avi is a talented lawyer who has all of the tools necessary to be an excellent law clerk and I am delighted to recommend him.

I worked closely with Avi when he was a student in a small seminar I teach in which students prepare comments on recent New York real estate cases. The comments are designed for publication in a monthly newsletter. Avi was the standout student in the class. His first drafts were always well-written and to the point, and he was quick to incorporate suggestions he received from me and from other class members. I ultimately published all of the comments he drafted, which does not often happen. Avi also was quick to identify problems with the drafts of his classmates, but he did so in a respectful and gentle way, making it easier for the recipient to hear and act on those problems. I was impressed with Avi's work and his work ethic.

Avi has really come in to his own during law school. He came to law school with a non-traditional educational background, but he has made the most of his law school experience. His judicial externships during law school and his Second Circuit experience will prepare him well for a clerkship in your chambers.

On a personal level I am confident that Avi will work well with members of your chambers staff. He has the maturity and judgment that will make him a valuable representative of your office in dealings with lawyers and others.

In short, Avi Rosskamm deserves your serious attention. You will not be disappointed if you hire him as your law clerk.

Stewart E. Sterk

H. Bert and Ruth Mack Professor of Real Estate Law

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NEW YORK 10007

DEBRA A. LIVINGSTON
CHIEF JUDGE

DAVID BOBER
DIRECTOR OF LEGAL AFFAIRS

February 2023

Dear Judge

I am writing in enthusiastic support of Avrohom Rosskamm's clerkship application. I am a Supervisory Staff Attorney at the United States Court of Appeals for the Second Circuit. Avi has worked in this office as a Staff Attorney law clerk since August 2021 and previously worked as a summer intern in 2020. I have personally supervised him during that time.

The primary function of the Staff Attorney's Office is to provide panels of circuit judges with bench memoranda on pro se appeals, pro se substantive motions, counseled substantive motions, and immigration cases. In their memoranda, the staff attorneys review the facts and procedural history of each appeal, analyze the applicable law, and recommend the proper disposition. Staff attorneys are required to handle a large number of cases, produce high quality work, and meet tight deadlines. They must also have an appropriate sensitivity to the pro se cases.

Avi has drafted bench memoranda on a wide variety of criminal and civil issues, primarily in pro se cases. He handles habeas corpus, civil rights, employment discrimination, criminal, prisoners' rights, social security and many other kinds of cases. He works with complex issues of civil procedure and appellate jurisdiction and sees the inner workings of an appellate court.

I am very impressed with Avi's performance. I have found his work to be dependable, focused, thoughtful, and meticulous. He is a conscientious, hard-working lawyer who researches skillfully and writes well. He is organized, efficient, and highly productive, taking on work when others are overwhelmed and volunteering for emergency motions. Moreover, he is clearly interested in the issues presented by his cases, dedicated to his work, and a pleasure to supervise. I served as a district court law clerk in the Southern District of New York upon graduation from law school and I believe I understand the demands of a clerkship. Avi would meet those demands and I am happy to recommend him for a position in your chambers.

Sincerely,

Catherine J. Minuse

Catherine J. Minuse

CARDOZO LAW
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Laura Cunningham
Professor of Law
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May 15, 2023

The Honorable Stefan Underhill
Brien McMahon Federal Building and
United States Courthouse
915 Lafayette Boulevard
Bridgeport, CT 06604-4706

Dear Judge Underhill:

I am writing this letter to offer my enthusiastic support for Avi Rosskamm's application to act as a law clerk in your chambers. If you have the opportunity to meet Avi I'm sure you'll agree that he is whip smart, dedicated and an excellent writer, all of which make him an excellent candidate.

I know Avi because he took two classes with me during his time at Cardozo, Federal Income Tax and Partnership Tax. Avi's exam performance in both classes was extraordinary, his was the third highest score in income tax (98%) and the fourth highest in Partnerships (96%). Both courses involve extensive statutory interpretation, and Partnerships requires a deep dive into the Treasury regulations. Viewed in the context of his full transcript, it becomes obvious that Avi earned his spot at the top of his graduating class. He performed at the highest level across disciplines and challenged himself throughout law school.

At Cardozo Avi demonstrated that his research and writing skills are terrific. He not only was on the Law Review, where his note was published, he also competed with the Moot Court Honor Society, and excelled. He pursued multiple opportunities to work with judges during his time at Cardozo, and successfully turned a summer internship with the Second Circuit's Staff Attorney's office into a post-graduation clerkship with that office.

I spoke with Avi recently and was impressed with how his confidence and understanding of himself have developed over his first year at the Second Circuit. He is thoroughly enjoying his time there, in particular the exposure that he is getting to various judges and types of law. While at the end of law school he told me he was leaning toward a career in litigation, the last year has clinched that preference. He loves to research and write, and he hopes to get yet more experience in chambers before looking for a permanent job.

By all objective measures, Avi is an excellent writer. He also has strong statutory analysis skills, something that singles him out. On a more subjective note, he strikes me as a very serious and focused person. We are lucky at Cardozo to have excellent students, but there are only one or two each year who demonstrate the kind of breadth that Avi has. I enjoyed having him in my classes and am confident he would be a welcome addition to your chambers.

If I can be of any further assistance in evaluating Avi's application, please contact me.

Sincerely,

Laura E. Cunningham
Professor of Law

Avi Rosskamm
324 Elmwood Avenue, Brooklyn, NY 11230 • (718) 913-4998 • rosskamm@law.cardozo.yu.edu

Writing Sample

The attached writing sample consists of a bench memorandum I drafted in my capacity as a law clerk at the Staff Attorney's Office, United States Court of Appeals for the Second Circuit. The factual details discussed throughout this sample, including names, dates, and citations to the record have been altered to maintain the privacy of the parties and to retain the integrity of the court. Furthermore, this sample has been edited by my supervisor, Catherine J. Minuse, whom I work closely with daily.

Issue Raised and Recommendation

Issue: David Frankel, pro se, appeals from the district court's dismissal of his trademark infringement action against SooZoo, Inc., a social media platform. Frankel and Dingy Empire, Inc. (collectively, the "Plaintiffs"), represented by counsel at that time, sued SooZoo in Connecticut Superior Court, claiming that SooZoo had infringed on Dingy Empire's trademark by refusing to take down several SooZoo pages containing the words "Dingy Empire." Plaintiffs also raised state law claims for tortious interference with business relations, trade libel, negligence, and unfair trade practices. After SooZoo removed the action to the District of Connecticut and Plaintiffs filed multiple amended complaints, the district court granted SooZoo's motion to dismiss, reasoning that Plaintiffs had failed to state their claims. After Plaintiffs appealed, the Clerk of Court informed Frankel that he could not proceed pro se on behalf of Dingy Empire. Frankel elected to proceed only on behalf of himself. The issue is whether to affirm the judgment.

Recommendation: Affirm the judgment because the district court correctly dismissed the action.

Background

I. State Court Proceedings

In December 2020, Dingy Empire, Inc., represented by counsel, sued SooZoo, Inc., in Connecticut Superior Court, alleging as follows. Record on Appeal ("ROA") doc. 1 (Compl.) at

7–12. Dingy Empire is a Connecticut corporation with its principal place of business in Connecticut. *Id.* at 7. SooZoo is a foreign corporation with its principal place of business in California, which does business in Connecticut. *Id.* SooZoo's website is an internet social media platform that, as relevant here, hosts users, including merchants, who can advertise, promote, and sell their goods and services. *Id.* Dingy Empire sells goods over the internet, primarily relies on the internet for its business model, and uses SooZoo to advertise its products for sale. *Id.* Dingy Empire's wares included clothes, cosmetics, and jewelry. *Id.* at 9. SooZoo hosts a webpage with the name "Dingy Empire," which was created without Dingy Empire's consent. *Id.* at 8. SooZoo has allowed this page to be "corrupted" or "infiltrated" by others, such that when potential customers click on Dingy Empire's page, they "are diverted to disturbing images of false content videos and websites which are unrelated to and are harmful" to Dingy Empire's business reputation. *Id.* Consequently, customers are discouraged from conducting business with Dingy Empire. *Id.* Although Dingy Empire has "repeatedly" requested SooZoo to cease this "practice," SooZoo has refused to take any remedial action. *Id.* SooZoo's refusal to act has caused Dingy Empire to lose revenues and profits and has destroyed its business value. *Id.*

Additionally, Dingy Empire maintains a trademark for its logo and for its goods. *Id.* at 9. At some point, Dingy Empire discovered that SooZoo hosted "several pages" bearing the Dingy Empire trademark. *Id.* Although Dingy Empire submitted a "take down request" for three of the pages because of the alleged trademark infringement, SooZoo refused to act. *Id.* at 10. Dingy Empire also raised claims under state law for unfair and deceptive trade practices. *Id.*

Dingy Empire sought compensatory and punitive damages, costs, attorney's fees, and injunctive relief, requiring SooZoo to "correct and fix its website so that the false and faulty information associated with Dingy Empire's name is corrected." *Id.* at 11.

II. District Court Proceedings

On January 15, 2021, SooZoo removed the action to the District of Connecticut, pursuant to 28 U.S.C. §§ 1331, 1338, 1367, 1441(a), and 1446. *Id.* at 1 (Notice of Removal). SooZoo asserted that the District of Connecticut had federal question jurisdiction under § 1331 and supplemental jurisdiction under § 1367, based on Dingy Empire's trademark infringement claim, under § 1338. *Id.* at 1–2. Removal was timely because SooZoo was served on December 22, 2020, and SooZoo removed the action on January 15, 2021, within the 30-day period prescribed by § 1446(b). *Id.* at 2.

In April 2021, SooZoo moved to dismiss the action for failure to state a claim and Dingy Empire opposed. ROA docs. 36 (Mot.), 36-1 (Mem.), 39 (Opp.), 40 (Mem.). However, before the district court ruled on the motion, Dingy Empire submitted several amended complaints and moved to join Frankel, the owner of the Dingy Empire trademark. *See* ROA docs. 41 (Joinder Mot.), 43 (Am. Compl.), 53 (Second Am. Compl.), 57 (Third Am. Compl.). The district court granted the motion to amend and terminated the motions to dismiss and to join. ROA docs. 46, 49, 54 (Text Ors.).

Filed in June 2021, the operative complaint added Frankel as a plaintiff, realleged the same set of facts, and raised claims for trademark infringement under federal and state law,[1] tortious interference with business relations, trade libel, negligence, and unfair trade practices, under the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. State. § 42-110a.[2] ROA doc. 57

[1] Conn. Gen. Stat. § 35-11i(a) provides a civil remedy for the infringement on a Connecticut-registered trademark.

[2] CUTPA prohibits any person from "engag[ing] in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a).

at 1–5. Plaintiffs sought the same relief Dingy Empire sought in state court and included a request for a temporary injunction. *Id.* at 6.

The operative complaint stated that exhibits were attached, but no exhibits were included in this version of the complaint. *See generally id.* at 1–9. An earlier version of the complaint included exhibits, which showed as follows. ROA doc. 43 at 8–33. Exhibit A contained SooZoo screenshots of a page titled "Dingy Empire." *Id.* at 12–18. The "About" section of the page showed that the page belonged to a musician in Malindi, Kenya. *See id.* at 13, 15. Exhibit B contained emails from an attorney, asking SooZoo to take down pages that were infringing on the Dingy Empire trademark. *See id.* at 20–31. Exhibit C contained a photo of the Dingy Empire logo. *Id.* at 33.

In September 2021, SooZoo moved to dismiss the action, arguing as follows. ROA doc. 60 (Mot.). The federal trademark infringement claim failed because Plaintiffs did not allege a likelihood of confusion, such that there was similarity between the trademark and posts on the alleged infringing webpages, and the exhibits showed that none of the webpages contained the Dingy Empire trademark. ROA doc. 60-1 (Mem.) at 17–19. The state law trademark infringement claim failed because Plaintiffs did not allege that they had registered any trademark under state law. *Id.* at 19–20. Plaintiffs did not state a tortious interference with business relations claim for two reasons. *Id.* at 11–13. First, Plaintiffs' allegations were insufficient to provide SooZoo with fair notice of their claim because the complaint did not identify Plaintiffs' own SooZoo page, including whether the page was maintained by Frankel or the Dingy Empire corporate entity, and because the complaint did not identify where visitors were being redirected to or what was offensive or disturbing about those pages. *Id.* at 11. Second, Plaintiffs failed to allege the necessary elements of a tortious interference claim. *Id.* at 12–13. The trade libel claim failed for

two reasons. *Id.* at 13–15. First, Plaintiffs failed to state several elements of a trade libel claim. *Id.* at 13. Second, SooZoo was protected from liability under the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c)(1).[3] *Id.* at 14–15. The negligence claim failed because SooZoo did not have a duty to prevent interference with Plaintiffs' trademark, and even if SooZoo did have such a duty, the complaint did not allege that other pages used Plaintiffs' trademark. *Id.* at 15–17. Finally, the unfair trade practices claim failed because Plaintiffs did not offer any facts to explain how SooZoo had violated CUTPA. *Id.* at 20–21.

SooZoo moved to stay discovery. ROA docs. 61 (Mot.), 61-1 (Mem.). The district court granted the motion. ROA doc. 70 (Text Or.).

Plaintiffs moved to reamend their complaint. ROA docs. 65 (Mot.) at 1; *id.* (Proposed Fourth Am. Compl.) at 6–39; 66 (Mem.). The proposed fourth amended complaint raised the same claims and factual allegations but attached the exhibits that had been attached to the version of the complaint at ROA doc. 43. *Compare* ROA doc. 65 at 6–39 *with* ROA doc. 43 at 8–33 *and* ROA doc. 57 at 1–6. SooZoo opposed the motion because the proposed amendment did not contain new factual allegations and only added exhibits, which SooZoo was already treating as incorporated by reference into the operative complaint. *See* ROA doc. 69 (Mem.) at 3–4. Additionally, SooZoo would have been prejudiced by the amendment because a new complaint would have mooted the outstanding motion to dismiss. *Id.* at 4–5. The district court denied the motion, reasoning that there were no new allegations and SooZoo was already treating the exhibits as incorporated into the operative complaint. ROA doc. 71 (Text Or.).

In October 2021, Plaintiffs opposed the motion to dismiss, arguing as follows. ROA doc.

[3] 47 U.S.C. § 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."